TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1911

No. [redacted]39

THE CITY OF CHICAGO, PLAINTIFF IN ERROR,

vs.

FRANK STURGES.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED APRIL 29, 1909.

(21,635.)

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 29, 1910.

1 *Transcript of Proceedings.*

UNITED STATES OF AMERICA,
State of Illinois, County of Cook, ss:

Pleas, before the Honorable S. C. Stough, Judge of the Thirteenth Judicial District of the State of Illinois, holding a branch of the Circuit Court of Cook County, at the request of the Judges of said Circuit Court; at a term thereof begun and holden at the Court House at Chicago, in said County and State, on the third Monday, being the 15th day of June in the year of our Lord one thousand nine hundred and eight and of the Independence of the United States the one hundred and thirty second.

Present, Honorable S. C. Stough, Judge of the 13th Judicial District of the State of Illinois, holding a branch of the Circuit Court of Cook County, State of Illinois.

JOHN J. HEALY, *State's Attorney.*
CHRISTOPHER STRASSHEIM, *Sheriff.*

Attest:
JOSEPH E. BIDWILL, JR., *Clerk.*

Be it remembered that heretofore to-wit on the 24th day of May, A. D. 1904, a certain Praecipe was filed in the office of the Clerk of said Court in words and figures following to-wit:

Filed Jul- 20, 1908. C. Mamer, Clerk Supreme Court.

2 STATE OF ILLINOIS,
County of Cook, ss:

Case —.

FRANK STURGES, Plaintiff,
vs.
CITY OF CHICAGO, Defendant.

Damages, $1,500.00.

The Clerk of said Court will issue a Summons in the above entitled cause to said defendant in a plea of trespass on the case to the damage of said plaintiff in the sum of Fifteen hundred Dollars, direct the same to the Sheriff of Cook County to execute and make it returnable to the June term of said Court A. D. 1904.

BULKLEY, GRAY & MORE.
Plaintiff's Attorneys.

To John A. Cook, Esq., Clerk.
Chicago, May 24, 1904.

Thereupon on the same day to-wit on the 24th day of May, A. D. 1904, a certain People's Writ of Summons issued out of the Office of the Clerk of said Court and under the Seal thereof directed to the Sheriff of Cook County to execute which writ together with the return of the sheriff thereon endorsed are in words and figures following to-wit:

Summons, Circuit Court.

STATE OF ILLINOIS,
County of Cook, ss:

The People of the State of Illinois to the Sheriff of said County, Greeting:

3 We command you that you summon City of Chicago if it shall be found in your County personally to be and appear before the Circuit Court of Cook County on the first day of the term thereof, to be holden at the Court house, in the City of Chicago, in said Cook County, on the third Monday of June, A. D. 1904, to answer unto Frank Sturges in a plea of trespass on the case, to the damage of said plaintiff, as it is said in the sum of Fifteen hundred dollars.

And have you then and there this writ with an endorsement thereon, in what manner you shall have executed the same.

Witness John A. Cooke, Clerk of our said Court, and the Seal thereof, at Chicago, in said County, this 24th day of May, A. D. 1904.

JOHN A. COOKE, *Clerk.*

No. —. Circuit Court of Cook County, —— Term, A. D. 190–. Summons.

Pd. -1.00. Served this writ on the within named defendant the City of Chicago by delivering a copy thereof to Carter H. Harrison, Mayor of said City this 27th day of May, 1904.

THOMAS E. BARRETT, *Sheriff,*
By F. W. BEWERSDORF, *Deputy.*

And thereupon the same day to-wit on the 24th day of May, A. D. 1904, a certain Declaration was filed in the office of the Clerk of said Court in words and figures following to-wit:

4 STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County, June Term, 1904.

Frank Sturges, plaintiff, by Bulkley, Gray & More, his attorneys, complains of the City of Chicago defendant in a plea of trespass on the case, etc.

For that whereas, complainant on to-wit the 16th day of July, 1903, at Chicago, to-wit, in the County aforesaid, was and for a

long time prior thereto had been the owner of the real estate and six story brick building located and being at the northwest corner of Green and Congress streets in the City of Chicago; that said real estate and building was then and there occupied by the Kellogg Switch Board Company as tenant of the plaintiff under a lease which provided that the plaintiff should re-place in said building any and all of the plate glass therein contained that might or should become broken or destroyed.

Plaintiff further avers that several weeks prior to the 16th day of July, 1903, the employees of the said Kellogg Switch Board Company went out on a strike and that said strike and controversy between the employees of said Kellogg Switch Board Company and said Company had continued with great virulence and was still continuing on said 16th day of July, 1903; that as a result of said strike and the endeavors of the Kellogg Switch Board Company to employ other persons in the place of the strikers, the place was picketed by the striking employees and many violent acts were perpetrated in so much that said building and premises and the employees of the Kellogg Switch Board Company had to be guarded by the police of the defendant City in order to protect said building and premises from damage and the employees from injury, of all of which
5 the defendant City had notice.

Plaintiff further avers that on to-wit the 16th day of July, 1903, in the afternoon of said day, the defendant City negligently and carelessly failed to furnish sufficient policemen to guard and protect said building and premises or to otherwise guard and protect the same, and that while the said building and premises were so insufficiently guarded and protected, a large mob or riot of more than twelve persons assembled around about said building in the streets and on the sidewalks and with brick-bats, stones and other missiles, broke and destroyed the following panes of plate-glass, contained in said building, viz:

2	panes, 88 x 76 in.	5	panes, 56 x 40 in.
1	" 38 x 40	1	panes, 76 x 134
4	" 76 x 124	3	" 76 x 106
6	" 40 x 48	1	" 76 x 152
4	" 40 x 42	4	" 76 x 184
6	" 40 x 54	1	" 76 x 154

That the value of said plate glass, so broken and destroyed, and the damage to said building was then and there the sum of One thousand and forty-eight dollars ($1048.00).

Plaintiff further avers that such destruction and injury was not in any way occasioned or aided, sanctioned or permitted by the carelessness, neglect or wrongful act of the plaintiff or of his tenant, Kellogg Switch Board Company, and that both plaintiff and said Kellogg Switch Board Company did everything in their power and used all reasonable diligence to prevent such damage.

6 Plaintiff further avers that afterwards to wit on the 3rd day of August, 1903, and within thirty days after the damage aforesaid was done, he presented to the defendant, City of

Chicago, notice of his claim for damages, in and by said noti
notifying the defendant, City of Chicago, that he was the own
of the building at the Northwest corner of Green and Congress stree
in the City of Chicago, then and there occupied by the Kellog
Switch Board Company as tenant; that on the 16th day of Jul
1903, the plate glass contained in said building were broken
consequence of and by a mob or riot composed of more than twel
persons as follows (describing the glass as hereinbefore described)
that the damage and destruction was not occasioned by or in an
way aided, sanctioned or permitted by the carelessness, neglect
wrongful act of the plaintiff, and that he used all reasonable dil
gence to prevent such damage; that the damage done amounted
One thousand and forty-eight dollars ($1048.00) and that h
claimed and demanded from the defendant, City of Chicago, thre
fourths of said sum, or the sum of seven hundred and eighty-si
dollars ($786.00) pursuant to the statute in such case made an
provided.

Plaintiff further avers that the defendant, City of Chicago, faile
and refused to pay to the plaintiff said sum of $786.00 or any par
thereof, and still refuses so to do, to the damage of the plaintif
of Fifteen hundred dollars ($1500) and therefore he brings sui
in accordance with the form of the statute in such case made an
provided.

BULKLEY, GRAY & MORE.
Pl'ff's Att'ys.

7 And afterwards to-wit on the 18th day of July, A. D
1904, a certain Plea was filed in the office of the Clerk o
said Court in words and figures following to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County.

Gen. No. 251,386.

FRANK STURGES
vs.
CITY OF CHICAGO.

And the defendant, City of Chicago, by Edgar B. Tolman, its
attorney, comes and defends the wrong and injury, when, etc., and
says that it is not guilty of the said supposed grievances above laid
to its charge, or any or either of them in manner and form as the
plaintiff has above thereof complained against it. And of this the
defendant puts itself upon the country, etc.

EDGAR B. TOLMAN,
Attorney for Defendant.

Plea not Guilty.

And afterwards to-wit on the 18th day of June, A. D. 1908, the following proceedings were had and entered of record in said Court to-wit:

251,836.

FRANK STURGES
vs.
CITY OF CHICAGO.

Case.

This cause being called for trial come the parties to this suit by their attorneys respectively and thereupon on the stipulation of said parties now here made in open court this cause is submitted to the court for trial without a jury and the Court now here after hearing all the evidence adduced and being fully advised in the premises finds the defendant guilty and assesses the plaintiff's damages at the sum of seven hundred and two dollars.

8

Therefore it is considered by the Court that the plaintiff do have and recover of and from the defendant City of of Chicago his said damages of seven hundred and two dollars $702.00, in form as aforesaid by the Court assessed together with his costs and charges in this behalf expended.

Whereupon the defendant having entered its exceptions herein prays an appeal from the judgment of this court to the Supreme Court of the State of Illinois which is allowed upon filing its bill of exceptions herein within 10 days from this date.

And afterwards to-wit on the 29th day of June, A. D. 1908, a certain Bill of Exceptions was filed in the office of the Clerk of said Court in words and figures following to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court of Cook County, Term No. —.

Gen. No. 251,836.

FRANK STURGES, Plaintiff,
v.
CITY OF CHICAGO, Defendant.

Bill of Exceptions.

Be it remembered, that heretofore to-wit: upon the Eighteenth day of June, A. D. 1908, the above entitled cause came on to be heard before Honorable Samuel C. Stough, Judge of the Thirteenth Circuit of the State of Illinois and presiding as Judge in the Circuit

Court of Cook County, a jury, by agreement of counsel fo
9 respective parties, being duly waived, and cause submitte
to the court.

Messrs. Bulkley, Gray & Moore appeared as attorneys for th
plaintiff;
Messrs. Robert N. Holt and Clyde L. Day appeared as attorney
for the defendant.

Whereupon the plaintiff, to maintain the issues upon his part h
his attorney introduced the following evidence:
Mr. HOLT: If the Court please the defense of this suit will be
question of constitutional law, and at the proper time, at the clos
of the evidence, I shall submit certain findings to be held by th
Court as to the law, and at this time I desire to object to the ad
mission of any evidence under this declaration, on the ground tha
the law or the act upon which it is based, is unconstitutional, in tha
it conflicts with the constitution of the State of Illinois; in that
conflicts especially with 14th and 15th amendments of the Constitu
tion of the United States, and the 2nd and 11th section- of the Bi
of Rights of the Constitution of the State of Illinois. I will tak
these questions up more fully with the court later, but I desire a
this time to object to the admission of the evidence.
The COURT: The evidence is objected to on that ground?
Mr. HOLT: Yes.
The COURT: And you will preserve an objection and exception.
Mr. HOLT: We save an exception to the ruling of the Court.
The objection was overruled by the Court, to which rulin
10 of the Court the defendant, by its attorneys, then and ther
duly excepted.

LEE STURGES, called as a witness on the part of the plaintiff, hav
ing been first duly sworn, testified as follows:

Direct examination by Mr. GRAY:

Q. Your name is what?
A. Lee Sturges.
Q. Who is Frank Sturges, the plaintiff?
A. My father.
Q. Are you familiar with the building on the west side, which i
on controversy in this suit?
A. Yes sir.
Q. I speak of the building at the northwest corner of Congres
and Green streets?
A. Yes sir.
Q. In 1903——

The COURT: What Section is that?
Mr. GRAY: If you have Hurd's Statutes there, if you will turn
to the Criminal Code.
Mr. HOLT: Hurd's Statutes of 1905, page 721.
Mr. GRAY: Of the Criminal Code.

Q. In 1903, who was the owner of that building?

Mr. HOLT: I object, as the deed is the best evidence.
The COURT: I think I will let him answer.
To which ruling of the Court the defendant by its attorneys, then and there duly excepted.
Mr. GRAY: I have the deed here anyway; I might as well introduce it.
Mr. HOLT: No objection to this instrument.
Mr. GRAY: I offer it in evidence.
Said document was admitted in evidence, marked as Plaintiff's Exhibit 1, and is as follows:

11 Q. Who was in possession of the property under that deed?
A. Mr. Frank Sturges.
Q. I will ask you if you recognize that lease. (Handing paper to witness.)
A. Yes sir.
Q. Do you know the parties to it?
A. Yes sir.

Mr. GRAY: I now offer lease dated October 1, 1902, from Frank Sturges, to the Kellogg Switchboard and Supply Company, running from the first day of October, 1902, until the 13th day of April, 1915, and particularly that part of the lease which provides that the party of the first part, the landlord, agrees to insure or replace all plate glass broken in said building, and the party of the second part agrees to replace all other broken glass, loss by fire, Act of God and so forth excepted.
Said document was admitted in evidence, marked as Plaintiff's Exhibit 2, and is in words and figures as follows to-wit:

Q. Do you know whether or not anything unusual prevailed in the locality of that building, on or about the 16th day of July, 1903?

Mr. HOLT: That is of his own knowledge.
Mr. GRAY: Yes, of your own knowledge.

A. Yes, there was a strike about the building, and a good deal of violence all through the day. I didn't see the actual destruction.

Mr. HOLT: I move that that be stricken out, your Honor.

The COURT: He says he didn't see the actual destruction; he has not sworn to that. You saw the strike in progress?
A. I saw the strike in progress all during the time but I left before this destruction occurred.

12 The COURT: Let it stand.
To which ruling of the Court the defendant by its attorney, then and there duly excepted.

Mr. GRAY:

Q. What was the last you saw of the building and the glass in that building before any violence occurred?

A. About half past four or five o'clock in the afternoon, everything in the building was all right.

Q. What was the condition of the windows and the glass in the windows at the time you last saw it?

A. It was all whole and in perfect order.

Q. When did you next see the building?

A. The next morning about eight o'clock.

Q. What was the condition of the building then with reference to the lights and windows?

A. The plate glass on the two sides of the building were broken out.

Q. Did you have anything personally to do with the replacing or having the glass replaced in the building?

A. I immediately asked for bids and after having received them, gave the order for the new glass.

Q. Have you the bids——

A. I think the bid is in the possession of the other witness.

Mr. HOLT: Well, I should object to this as not original evidence. I presume you will have the plate glass man here.

Mr. GRAY: Yes I have.

Mr. HOLT: Well, what is the use of bothering with all this. It simply burdens the record; that is all;

Mr. GRAY:

Q. Do you know how long the strike had been on before the time you speak of?

A. It commenced sometime in May, early in May, and this occurred about the 16th of July.

13 Q. 1903?

A. 1903.

Q. Where did you say this building was?

A. On the northwest corner of Congress and Green streets.

Q. What City?

A. Chicago.

Q. Was this glass that you speak of fixed in the building?

A. Yes sir.

Mr. GRAY: I think that is all.

Mr. HOLT: No cross-examination.

The COURT:

Q. What kind of laborers were in the strike?

A. The entire employés—nearly all of the employés of the Kellogg Company, various classes of labor.

Q. How many all told?

A. Oh, several hundred; I couldn't state the exact number.

Q. Do you know when that terminated, of your own knowledge?

A. Well, it was on for a good many months after that. There is a witness here from the Kellogg Company that can give that better than I can.

The COURT: That's all.

Mr. GRAY:

Q. Were any of these strikers in the employ of Frank Sturges?
A. No sir.
Q. Or in any business in which Frank Sturges was interested?
A. No sir.
Q. Do you know the signature attached to the document I now show you, which is marked "Notice and Demand."
A. Yes sir.
Q. Whose signature is that?
A. Frank Sturges.

Mr. GRAY: We offer the notice in evidence.
Mr. HOLT: That is the same notice you showed me a while ago?
Mr. GRAY: Yes.

14 Said document was admitted in evidence, marked as plaintiff's Exhibit 3, and is in words and figures — follows, to-wit:

Copy.

CHICAGO, *August* 1, 1903.

To the City of Chicago, Carter H. Harrison, Mayor; Lawrence E. McGann, Comptroller, and Edgar B. Tolman, Corporation Counsel:

You and each of you are hereby notified that I am the owner of the building at the northwest corner of Green and Congress streets, in the City of Chicago, now occupied by the Kellogg Switch Board Company as tenant; that on the 16th day of July, 1903, plate glass contained in said building were broken in consequence of and by a mob or riot composed of more than twelve persons as follows:

2	panes,	88 x 76 in.	5	panes,	56 x 40 in.
1	"	38 x 40	1	"	76 x 134
4	"	76 x 124	3	"	76 x 106
6	"	40 x 48	1	"	76 x 152
4	"	40 x 42	4	"	76 x 184
6	"	40 x 54	1	"	76 x 154.

You are further notified that for the purpose of ascertaining the amount of damage caused by the breakage of such glass, I immediately asked H. M. Hooker Company, Tyler and Hippach and the Pittsburg Plate Glass Company to submit bids for the replacing of said broken plate glass and thereafter received bids from said parties as follows:

H. M. Hooker Co.	$1078
Tyler & Hippach	1039
Pittsburg Plate Glass Co	1048

and thereupon I let the contract to the Pittsburg Plate Glass Company to replace said broken plate glass.

15 You are further notified that the damage and destruction aforesaid, was not occasioned or in any way aided, sanctioned,

or permitted by the carelessness, neglect or wrongful act of myself and that I used all reasonable diligence to prevent such damage.

You are further notified that the damage done amounted to $1048 and that I claim and demand from the City of Chicago, three-fourths of said sum or the sum of $786 pursuant to an Act of the General Assembly of the State of Illinois, entitled, "An Act to indemnify owners of property for damages occasioned by mobs and riots," approved June 15, 1887, in force July 1st, 1887, this notice and demand being given and made within thirty days after the loss or damage aforesaid, pursuant to said Act.

(Signed) FRANK STURGES.

BULKLEY, GRAY & MORE, *Attorneys.*

Received a copy of the foregoing notice and demand this 3d day of August, 1903.

(Signed) EDGAR B. TOLMAN,
Corporation Counsel,
By WM. H. SEXTON, *Ass't C. C.*

STATE OF ILLINOIS,
Cook County, ss:

J. Ellsworth Owen, being first duly sworn deposes and says that he served the within notice and demand on Lawrence E. McGann, comptroller, by leaving a copy thereof with Charles J. O'Connor chief clerk in the office of said McGann, the 3rd day of August, 1903; and on Carter H. Harrison, Mayor by leaving a copy of said notice and demand with Ernest McGaffey, the private secre-
16 tary of said Harrison, the 6th day of August, 1903.

(Signed) J. ELLSWORTH OWEN.

Subscribed and sworn to before me this 6th day of August, 1903.

(Signed) I. F. STEVENS,
[NOTARIAL SEAL.] *Notary Public."*

JOHN PERRY, produced as witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. GRAY:

Q. What is your name?
A. John Perry.
Q. What is your occupation?
A. Superintendent of Sturges & Burn Manufacturing Company.
Q. Where is their place of business?
A. Harrison & Green Peoria and Congress.
Q. In 1903, were you familiar with this building at the corner of Congress and Green streets?
A. Yes sir; I have charge of keeping it in repair and so forth.
Q. Did you at that time?
A. At that time, yes.
Q. That is to say, this building was under your supervision?

A. That is, the repairs of the building yes.
Q. Who was the occupant in July 1903?
A. The Kellogg Switchboard Company.
Q. Do you know of anything unusual happening in that month?
A. A strike commenced about May 7th I think, approximately May 7th early in May.
Q. Were you at the building on the 16th of July, 1903?
A. In the Kellogg building?
A. Yes.
A. No sir; I couldn't get in.
Q. What?
A. No sir; I was not.
Q. Were you at the building?
A. I was by the building, yes.
Q. Well, when you say "by," that might mean a mile away?
A. On the outside of the building.
Q. You were right at the building?
A. At the building, outside, yes.
Q. What time in particular have you in mind that you were outside of the building, on the 16th of July, 1903?
A. Well, I was there at 12 o'clock, 12:30; passed it again at 5:15, and again at a quarter to seven in the evening.
Q. What if anything did you see, if anything, with reference to the building of the plaintiff referred to in this case?
A. I didn't catch that.
Q. Did you see any acts of violence there?
A. There was acts of violence continually there for six weeks to two months.

Mr. HOLT: I move that that be stricken out as not responsive.
The COURT: Sustain the motion.
Mr. GRAY: Wait a moment; listen to the question.

Q. Did you see anything on the 16th of July, 1903——
A. I saw a riot on the 16th of July.
Q. What did you see?
A. I saw the police and a crowd of people, and a riot call was sent in at about fifteen minutes to seven and I saw the windows broken.
Q. How many people were gathered there?
A. From two to three thousand.
Q. What were they doing?
A. Well, hollering and throwing brick-bats, stones, anything that came along.
Q. What if anything did you do in connection with the police towards suppressing that?
A. I couldn't do anything I couldn't get near the place.
Q. You said something about a riot call?
A. They sent in a riot call: I saw the riot call sent in.
Q. Was that after this destruction?
A. After the destruction, yes.
Q. What was the result of this throwing of brick bats and other things that you spoke of?

A. Well all the lower windows was broken, and some of the upper ones.
Q. In which building?
A. In the Kellogg Switchboard Building.
Q. Located where?
A. At Congress and Green.
Q. In this city.
A. In this city.
Q. The city of Chicago?
A. The city of Chicago.
Q. You say all the windows on the lower floor——
A. Yes sir.
Q. Any other windows?
A. Some of the upper windows, some of the windows on the second floor were broken.
Q. Have you with you a memorandum of what was broken at that time.
A. Yes, I have a memorandum of it.
Q. Produce it, will you?

(The witness produces a paper.)

Q. Tell us how many lights of glass were broken, and the sizes of them?

Mr. HOLT: Objected to.

—. There was 38 lights——

Mr. HOLT: I object, unless it is limited to plate glass.
Mr. GRAY: Limit it to plate glass.

A. 38——
Q. Did you see those glasses broken yourself?
A. Yes sir. I saw those broken. There was two windows 88 by 76 one 38 by 40; four 76 by 124; six 40 by 48; four 40 by 42; six 40 by 54; five 56 by 40; one 76 by 134; three 76 by 106; one 76 by 150; four 76 by 184; one 76 by 154.
19 Q. Have you any sizes in that lot?
A. Yes.
Q. Do you know what men they were—were they men who worked around there—do you know anything about that?
A. Well, most of them was pickets, pickets they had during the strike; of course there was a lot——
Q. You say they were strikers of the Kellogg Switchboard and Supply Company?
A. Yes.
Q. Were there any of the Sturges & Burn men?
A. No, there was none of my men at all.

Mr. GRAY: That is all.
Mr. HOLT: No cross examination.

HERMAN DIETZ, produced as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. GRAY:

Q. What is your name?
A. Herman Dietz.
Q. Where do you live?
A. 261 North Ashland avenue.
Q. What is your business?
A. I am in the land business just now, real estate.
Q. What was your business in 1903?
A. I was a special officer at that time.
Q. What is "special officer"?
A. Well, a private officer around the Kellogg Building during the strike; that is, protecting things.
Q. A police officer were you?
A. Yes sir; especially sworn in.
Q. Whom were you employed by?
A. By a party named Flynn.
Q. Were you working for the Kellogg Switchboard and Supply Company?
A. Well, the offices were outside during that time. I was working as a special officer on the outside. The party that I worked for was hired by the Kellogg Switchboard people.
20 Q. To do what—you say to preserve order?

Mr. HOLT: Let him testify, please.

A. Walking around there preserving order and taking people home from the building.
Q. Have you in mind, Mr. Dietz, the 16th day of July, 1903, as to whether or not anything occurred?
A. Well, I left that night at a quarter past five, and found everything in good shape around the building.
A. Yes.
A. I escorted every night five men from the building so they would not be beat up by these outside people that was called strikers.
Q. Were any city police there when you left at a quarter past five?
A. Yes sir; I should judge about six or seven were around the building, around the Kellogg building, at different places.
Q. Were you there the next morning?
A. Yes sir.
Q. What did you see in reference to this building, as to whether or not there had been any change?
A. Yes there was quite a change. All the windows was broke. I got there about seven in the morning,—all the plate glass.

Mr. GRAY: I think that is all.
Mr. HOLT: No cross examination.

J. H. KNIGHTS, produced as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct examination by Mr. GRAY:

Q. What is your name?
A. J. H. Knights.
Q. What is your business?
A. I am credit man of the Pittsburg Plate Glass Company.
Q. What was your business in 1903?
A. I am employed by the Pittsburg Plate Glass Company.

Q. Did you have anything to do with looking over cer-
21 tain glass that was broken in the building of Mr. Frank Sturges, at Green and Harrison Streets?

A. Why, I know there was an estimate made on the damage at that time, of broken glass that was there.

Mr. HOLT:

Q. Did you make the estimate, Mr. Witness?

Mr. GRAY:

Q. Did you make the estimate?
A. I didn't personally, no, sir.
Q. Do you know what was the fair market value of plate glass of the sizes and dimensions——

Mr. HOLT: I object to showing the witness that memorandum, because it has values upon it.

Mr. GRAY: Well, did you see the glass that was furnished to supply the broken glass?

A. Why I saw an invoice that covered it.
Q. Who put that glass in, that is to say, what firm restored the glass?
A. The Pittsburg Plate Glass Company.
Q. Well, what would a glass 88 by 76, plate glass be worth?

Mr. GRAY: Do you want me to prove these items?

Mr. HOLT: I have no objection to his stating from the estimate the fair and reasonable values——

The WITNESS: The estimate made at that time was made at the market price of the glass at that time.

Mr. GRAY: Well, have you the price there which was charged for the restoring of the glass in question, and are you able to say that that was a fair and reasonable price?

A. This is a copy of the estimate that was made at that time. I haven't a copy of the bill.
Q. Well, you have the original estimate?
A. The original estimate; yes, sir, of the glass that was broken.

Q. And was that glass restored by the Pittsburg Plate
22 Company?

A. It was; yes sir.

The COURT: At that estimate?

A. A slightly decreased amount, I think. They changed the windows.

Mr. GRAY: Slightly decreased?

A. They changed the openings and made them smaller; cut them down.

The COURT: Well, how much of a decrease was there from the estimate.

A. My memory of it is that the bill for the glass as we put it in was something like $936, the estimate.

The COURT: As it was finally put in?

A. As it was finally put in; yes sir.

Mr. GRAY: Was that a fair and reasonable value?

A. Yes sir.

The COURT: Your estimate was a little more than that?

A. The estimate was a little more.

Mr. GRAY: What did you say, how much?

A. My memory of it is $936.

Q. I show you a memorandum of 38 panes of plate glass, and ask you if you know what the fair market value of those panes was, on or about the 16th of July, 1903?

Mr. HOLT: Objected to; he has given the cost of replacing this glass as $936.

A. No, I beg your pardon.

The COURT: What was the question?

Mr. GRAY: Whether he knows the value of this glass that was broken. The items of glass that he now has in his hand were the items that were broken.

23 The COURT: I think I will let him answer that.

To which ruling of the Court the defendant, by its counsel, then and there duly excepted.

A. It figured at the market value at that time, was $1048.

The COURT: How much?

A. $1048.00.

The COURT:

Q. What was the other amount, nine what?

A. $936 was the glass as put in.

The COURT: And ten hundred and what?

A. $1048.

Mr. GRAY: What you mean to say, Mr. Knights, is that the glass which was restored——

Mr. HOLT: No, I object to that as leading.

The COURT: I will sustain the objection.

Mr. GRAY: I had not finished.

Mr. HOLT: I know, but it was leading already.

Mr. GRAY: That is all.

Cross-examination by Mr. HOLT:

Q. Your company replaced that plate glass did they?
A. Not in the sizes that were broken.
Q. What?
A. Not the sizes that were broken.
Q. Did you make the repairs on the building, as far as plate glass was concerned?
A. Yes sir.
Q. And what did you charge for those repairs?
A. $936.
Q. And you repaired it completely?
A. Yes sir.

Mr. HOLT: That is all.

Redirect examination by Mr. GRAY:

Q. Was it repaired and put in the same condition it was before it was broken?
A. No sir.
24 Q. Was what you restored and put in place of the broken glass, as valuable as was the glass that was in before?

Mr. HOLT: Objected to.

A. No.

Mr. HOLT: There is nothing to show that he ever saw the glass that was in there before, or knows the size of it, or anything else, or how old it was, or whether it was cracked or chipped or what.
The COURT: I will sustain the objection.
Mr. GRAY: That is all.
Mr. HOLT: That is all.
Mr. GRAY: I don't think of anything else.
Mr. HOLT: You rest then?
Mr. GRAY: Yes.
Mr. HOLT: I move to strike out all the evidence on the ground that the declaration is based on an unconstitutional law, and therefore no evidence is admissible under it.
The COURT: I will overrule that motion and give you an exception.
To which ruling of the Court the defendant by its attorney, then and there duly excepted.
Mr. GRAY: I want to offer some findings of fact here now, under the new Practice Act. I must do that I understand, before the close of the proof. (Handing papers to Court.)
Mr. HOLT: May I have a copy of them?
Mr. GRAY: You may have that. (Handing papers to counsel for defendant.)
25 Mr. HOLT: We object to the findings of fact as submitted, and save an exception to any finding by the Court on them, and we submit the following proposition to be held as law in the decision of this case. I will just give an outline of them here, and I will give the Court a full written copy. First, it contravenes and

s in conflict with the Constitution of the United States; also that
t contravenes and is in conflict with the Constitution of the State
f Illinois; also that it contravenes and is in conflict with Sections
and 11 of article 2 of the Constitution of the State of Illinois; also
hat it contravenes and conflicts with the 5th amendment of the
Constitution of the United States to the first section of the 14th
mendment of the Constitution of the United States. The proposi-
ions are submitted to the court, and I will say a little on that sub-
ect to show the Court the position that I want to take in this mat-
er.

The findings of fact submitted to the court by counsel for plain-
iff are as follows, to-wit:

The propositions of law submitted to the Court in writing, by
ounsel for the defendant are in words and figures as follows, to-
it:

Which was all the evidence produced or offered by or upon behalf
f either of the parties upon the trial of said case;

And thereupon the court upon the submission to it in writing
f questions of fact by the plaintiff in the above entitled cause found
as follows:

6 The Court finds from the evidence in this case the fol-
lowing facts:

First. That on and prior to the sixteenth day of July, 1903, the
laintiff, Frank Sturges, was the owner of the real estate and brick
uilding, located and being at the northwest corner of Green and
ongress streets in the City of Chicago;

Second. That said real estate and building was then and there oc-
upied by the Kellogg Switchboard Company, as tenant of the plain-
iff, under a lease containing a provision that the plaintiff should re-
lace in said building, any and all plate glass contained therein that
night or should become broken or destroyed.

Third. That on and prior to the sixteenth day of July, 1903, the
mployees of the Kellogg Switchboard Company were out on a
trike, and that the controversy between the employees of the Kellogg
witchboard Company and the company had for some time previous
o the sixteenth day of July been, and on the said sixteenth day of
uly, 1903, was, continuing with great virulence;

Fourth. That as a result of said strike, the Kellogg Switchboard
ompany was endeavoring to employ other persons in the place of
he strikers and the strikers had the premises picketed;

Fifth. That the building had for some days previous to the six-
eenth day of July, 1903, been guarded by the police of the City of
hicago, to prevent damage to said building and premises and in-
ury to the employees of the said Kellogg Switchboard Com-
pany;

7 Sixth. That on the afternoon of the sixteenth day of July,
1903, part of the police that had been kept about said build-
ng, guarding it, were withdrawn, and a riot broke out, in which a
arge number of persons, more than twelve, were engaged and as-
embled about said building, and that said rioters, surrounding said
uilding, threw brickbats, stones and other missiles at the building
nd the windows, and broke out from said building plate glass con-

t-ined in the windows of said building, to the value of nine hundred thirty six ($936.00) Dollars.

Seventh. That the plaintiff did not in any way occasion or aid or sanction or permit the breaking of said glass, nor did the Kellogg Switchboard Company; and both the plaintiff and said switchboard company, used all reasonable diligence to prevent such damage;

Eighth. That, afterwards, on the third day of August, 1903, the plaintiff caused to be served upon the City of Chicago a notice and claim for damages, in which notice the plaintiff notified the City that he was the owner of said building; that it was occupied by the Kellogg Switchboard Company, as tenant, on the sixteenth day of July, 1903; that plate glass in said building was broken in consequence of a mob or riot composed of more than twelve persons, describing the glass broken; that the damage was not occasioned or in any way aided, sanctioned or permitted by the carelessness, neglect or wrongful act of plaintiff, and that the plaintiff used all reasonable diligence to prevent such damage; and that the damage amounted to ten hundred and forty eight dollars ($1048) and that he claimed and demanded from the city three-fourths of said sum or the sum of Seven hundred eighty six ($786) Dollars pursuant to the statute.

28 (To which action of the court in making the above findings of facts and each of them the defendant by its counsel then and there duly excepted.)

And thereupon the plaintiff by its attorneys presented to the court a written proposition to be held as law in the decision of the case, which proposition is in words and figures as follows:

"Held." The Court holds as a proposition of law under the facts found in this case, that the plaintiff is entitled to recover under the statute three-fourths of the amount of the damages suffered by him.

And thereupon the Court marked said proposition "held."

(To which action of the court in marking said proposition of law "Held" the defendant, by its counsel then and there duly excepted.)

And thereupon the defendant, by its attorneys, submitted to the court and asked it to hold as law in the decision of this case and to mark thereon the word "Held" the following written proposition:

The act of the General Assembly of the State of Illinois, entitled "An Act to indemnify the owners of property for damages occasioned by mobs and riots," approved June 15, 1887, and in force July 1, 1887, and under which this action is brought contravenes and conflicts with the provisions of the Constitution of the State of Illinois, and is unconstitutional and void.

But the court refused to hold said proposition as law in the decision of the case and to mark thereon the word "Held" but

29 marked thereon the word "Refused."

(To which action of the court in refusing to hold said proposition as law in the decision of the case and in refusing to mark thereon the word "Held" and in marking thereon the word "Refused" the defendant, by its attorneys then and there duly excepted.)

And thereupon the defendant by its attorneys submitted to the court and asked it to hold as law in the decision of this case and to mark thereon the word "Held" the following written proposition:

The act of the General Assembly of the State of Illinois entitled "An Act to indemnify the owners of property for damages occasioned by mobs and riots," approved June 15, 1887, and in force July 1, 1887, and under which this action is brought, contravenes and conflicts with the provisions of the Constitution of the United States, and is unconstitutional and void.

But the court refused to hold said proposition as law in the decision of the case and to mark thereon the word "Held" but marked thereon the word "Refused."

(To which action of the court in refusing to hold said proposition as law in the decision of the case and in refusing to mark thereon the word "Held" and in marking thereon the word "Refused" the defendant, by its attorneys then and there duly excepted.)

And thereupon the defendant by its attorneys submitted to the court, and asked it to hold as law in the decision of this case and to mark thereon the word "held" the following written proposition:

30 The act of the General Assembly of the State of Illinois entitled "An Act to indemnify the owners of property for damages occasioned by mobs and riots," approved June 15, 1887, and in force July 1, 1887, and under which this action is brought, is in conflict with and in controvention of sections 2 and 11 of article 2 of the Constitution of the State of Illinois and is unconstitutional and void.

But the Court refused to hold said propositon as law in the decision of the case and to mark thereon the word "Held" but marked thereon the word "Refused."

(To which action of the court in refusing to hold said proposition as law in the decision of the case and in refusing to mark thereon the word "Held" and in marking thereon the word "Refused" the defendant, by its attorneys then and there duly excepted.)

And thereupon the defendant, by its attorneys, submitted to the court, and asked to hold as law in the decision of this case and to mark thereon the word "Held" the following written proposition.

The act of the General Assembly of the State of Illinois entitled "An act to indemnify the owners of property for damages occasioned by mobs and riots," approved June 15, 1887, and in force July 1, 1887, and under which this action is brought is in conflict with and in contravention of the 5th amendment of the Constitution of the United States and the first section of the 14th amendment to the Constitution of the United States, and is unconstitutional and void.

31 But the court refused to hold said proposition as law in the decision of the case and to mark thereon the word "Held" but marked thereon the word "Refused."

(To which action of the court in refusing to hold said proposition as law in the decision of the case and in refusing to mark

thereon the word "Held," and in marking thereon the word "Re fused" the defendant, by its attorneys then and there duly ex cepted.)

And thereupon the defendant by its attorneys submitted to the court and asked it to hold as law in the decision of this case and to mark thereon the word "Held" the following written proposition.

That upon consideration of the pleadings and all of the evidence the plaintiff is not legally entitled to recover.

But the court refused to hold said proposition as law in the de cision of the case, and to mark thereon the word "Held" but marked thereon the word "Refused."

(To which action of the court in refusing to hold said proposi tion as law in the decision of the case and in refusing to mark thereon the word "Held" and in marking thereon the word "Re fused" the defendant, by its attorneys, then and there duly ex cepted.)

And for as much as the matters above set forth do not fully ap pear of record, the defendant by its attorneys tenders this, its Bill of Exceptions, and prays that the same may be signed and sealed by the Judge of this Court pursuant to the statute in such case made and provided, which is done accordingly this 25th day of June A. D. 1908.

SAMUEL C. STOUGH, *Judge.* [SEAL.]

O. K.

BULKLEY, GRAY & MORE,
Att'ys for Pl'ff.

32 Filed Jun- 29, 1903, 3:53 p. m. Joseph E. Bidwill, Jr., Clerk
per —— Grubbs, Deputy.

Circuit Court, Cook County.

Gen. No. 251,836.

STURGES
v.
CITY OF CHICAGO.

STATE OF ILLINOIS,
County of Cook, ss:

In the Circuit Court.

Gen. No. 215,422.

FRANK STURGES
v.
CITY OF CHICAGO.

It is stipulated by the parties hereto through their respective at torneys that the original bill of exceptions herein be incorporated in the transcript of record in lieu of a copy thereof.

BULKLEY, GRAY & MORE,
Attorneys for Plaintiff.
EDWARD J. BRUNDAGE,
Corporation Counsel, Attorney for Defendant.

STATE OF ILLINOIS,
County of Cook, ss:

I, Joseph E. Bidwell, Jr., Clerk of the Circuit Court of Cook County and the keeper of the records and files thereof, in the State aforesaid, do hereby certify the above and foregoing to be a
33 true, perfect and complete transcript of record except the Bill of Exceptions the original of which is incorporated herein by stipulation, in a certain cause lately pending in said Court on the Law side thereof between Frank Sturges Plaintiff and City of Chicago defendant.

In witness whereof I have hereunto set my hand and affixed the seal of said Court at Chicago in said County this 14th day of July, 1908.

[SEAL.] JOSEPH E. BIDWELL, JR., *Clerk.*

Assignments of Error in the Supreme Court.

And now comes the appellant, City of Chicago, by Robert N. Holt and Clyde L. Day, its attorneys, and shows to the court here that in the record and proceedings aforesaid there is manifest error in this to-wit:

1. The Circuit Court of Cook County erred in overruling the motion to strike out all the evidence, on the ground that the declaration is based on an unconstitutional law.

2. The said Circuit Court of Cook county erred in holding as a proposition of law, under the facts found in the case, that the plaintiff was entitled to recover, and in marking the proposition of law submitted by the plaintiff as "Held."

3. The said Circuit Court of Cook County erred in refusing to hold the said first proposition of law submitted by the defendant as law in the decision of the case and in marking thereon the word "Refused."

4. The said circuit court of Cook county erred in refusing to hold the said second proposition of law submitted by the defendant as law in the decision of the case, and in marking thereon the word "Refused."

34 5. The said Circuit Court erred in refusing to hold the said third proposition of law submitted by the defendant as law in the decision of the case, and in marking thereon the word "Refused."

6. The said Circuit Court of Cook county erred in refusing to hold the said fourth proposition of law submitted by the defendant as law in the decision of the case, and in marking thereon the word "Refused."

7. The said Circuit Court of Cook county erred in refusing to hold the said fifth proposition of law submitted by the defendant as law in the decision of the case, and in marking thereon the word "Refused."

8. The said judgment of said Circuit Court of Cook county was and is contrary to the law.

9. The said Circuit Court of Cook county erred in rendering

judgment in favor of the appellee and against the appellant, City of Chicago, upon the facts and pleadings.

The appellant, City of Chicago, therefore prays that the said judgment be reversed, annulled, and altogether held for naught.

CITY OF CHICAGO,
Appellant,
By ROBERT N. HOLT,
CLYDE L. DAY,
Assistants Corporation Counsel, Its Attorneys.

EDWARD J. BRUNDAGE,
Corporation Counsel, of Counsel.

35 At a Supreme Court, begun and held at Springfield on Tuesday, the Sixth day of October in the year of our Lord One Thousand Nine Hundred and Eight within and for the State of Illinois.

Present: James H. Cartwright, Chief Justice; John P. Hand, Justice; Guy C. Scott, Justice; William M. Farmer, Justice; Alonzo K. Vickers, Justice; Orrin N. Carter, Justice; Frank K. Dunn, Justice; William H. Stead, Attorney General; Warren C. Murray, Bailiff.

Attest:
CHRISTOPHER MAMER, *Clerk.*

Be it remembered, to-wit, on the Twentieth day of July, A. D. 1908, the same being one of the days in vacation before the Supreme Court term aforesaid, a certain transcript of record was filed in the office of the Clerk of the Supreme Court in words and figures following, to-wit:

No. 6209.

FRANK STURGES, Appellee,
vs.
CITY OF CHICAGO, Appellant.

Appeal Circuit Court Cook.

36 Be it remembered, to-wit, on the Sixteenth day of October, A. D. 1908, the following proceedings were by said Court had and entered of record to-wit:

6209.

FRANK STURGES, Appellee,
vs.
CITY OF CHICAGO.

Appeal Circuit Court Cook.

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this

urt, and it appearing to the Court that —— ——, appellant, hath d herein a duly certified transcript of the record and proceedings the Court below, together with printed abstracts thereof, and efs and arguments of counsel in support of the errors assigned rein, and entered motion to reverse the judgment and remand d cause and for costs, and the said appellee, —— ——, having ered motion to affirm said judgment and for costs and pro- lendo, and said motions being taken under advisement for final aring, and the Clerk of this Court reporting that said cause is w ready to be taken, and said cause is here submitted for the sideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the ne is hereby taken under advisement.

At a Supreme Court, begun and held at Springfield on Tuesday, the First day of December, in the year of our rd One Thousand Nine Hundred and Eight, within and for the te of Illinois.

Present: James H. Cartwright, Chief Justice; John P. Hand, stice; Guy C. Scott, Justice; William M. Farmer, Justice; Alonzo Vickers, Justice; Orrin N. Carter, Justice; Frank K. Dunn, stice; William H. Stead, Attorney General; Warren C. Murray, iliff.

Attest:

J. McCAN DAVIS, *Clerk*.

Be it remembered, that afterward, to-wit, on the 15th day of cember, 1908, the opinion of the Court was filed in the words d figures following to-wit:

No. 6209.

FRANK STURGES
v.
CITY OF CHICAGO.

Error to ——.

Appeal from Circuit Court Cook.

Mr. JUSTICE HAND delivered the opinion of the court:

This was an action on the case commenced by Frank Sturges, e appellee, against the city of Chicago, the appellant, in the rcuit Court of Cook County, to recover damages for an in- ry to the property of the appellee caused by a mob or riot in the y of Chicago on the 16th day of July, 1903. A jury was waived, d the cause, by agreement of the parties, was tried by the court, d resulted in a finding and judgment in favor of the plaintiff for e sum of $702, and the city has prosecuted this appeal.

The declaration contained one count, and alleged that the plain- f was the owner of a six-story brick building located at the corner

of Green and Congress streets, in the city of Chicago; that on the 16th day of July, 1903, during a strike, a large mob or riot of more than twelve persons assembled in the vicinity of said building, and with stones, brickbats and other missiles broke and destroyed a large quantity of plate glass in the said building of the value of $1048; that the destruction and injury to said plate glass and said building were not occasioned by the negligence or wrongful
39 act of the plaintiff or his tenant; that the plaintiff used all diligence to protect his property from being destroyed or injured, and averred that notice of the injury to his property was given to the city on the third day of August, 1903. The general issue was filed, and on the trial defendant submitted certain propositions in writing which challenged the constitutionality of the said statute on the ground that it was in conflict with the State and Federal constitutions, and particularly in conflict with section 22 of article 4 and sections 2 and 11 of article 2 of the State constitution, and in conflict with the provisions of the fifth amendment and the first section of the fourteenth amendment to the constitution of the United States, which propositions were all marked "refused" by the court.

The suit is based upon an act of the legislature of this State entitled "An act to indemnify the owners of property for damages occasioned by mobs and riots," approved June 15, 1887, in force July 1, 1887, (Laws of 1887, p. 237,) and it is conceded by the appellant if said act is constitutional appellee was entitled to recover in the court below, and the judgment of that court should be affirmed.

Section 1 of the act of 1887 reads as follows: "Be it enacted by the People of the State of Illinois, represented in the General Assembly: That whenever any building or other real or personal property, except property in transit, shall be destroyed or injured in consequence of any mob or riot composed of twelve or more persons, the city, or if not in a city then the county in which such property was destroyed, shall be liable to an action by or in behalf of the party whose property was thus destroyed or injured, for three-fourths of the damages sustained by reason thereof."

The constitutionality of this act was before this court in City of Chicago v. Manhattan Cement Co. 178 Ill. 372, and in Dawson Soap Co. v. City of Chicago, 234 id. 314, and it was there sustained. It is, however, contended by appellant that the act should be held unconstitutional in this case upon grounds other than those
40 upon which it is said the former decisions of this court were based and for reasons which were not then presented to the court either in the briefs filed by counsel or upon oral argument. Counsel for the appellant now contend that said act is unconstitutional for the following reasons: First, because the act makes the location of the property destroyed or injured, and not the place where the mob assembled or the riot occurred, the criterion as to who should be punished; and second, because the act makes the liability of the city or county conclusive from the fact, alone, that the property was destroyed or injured within the limits of the city

r county, and wholly regardless of the fact whether the city or ounty, or its officers, were guilty of negligence or had the power o disperse the mob or suppress the riot.

To emphasize the first position of the appellant, it is said in the rief filed by counsel on its behalf, a mob may assemble or a riot ccur in one city or county, or even in a foreign State, and by the se of dynamite or cannon destroy or injure property in another ity or county or in this State, and that the city or county "in which uch property was destroyed or injured" may be held liable under he statute although the city or county where the destruction or njury to the property occurred was powerless to disperse the mob r suppress the riot, as the mob or rioters were beyond the limits of he city or county. Whether a city or county in which a mob as-embled or a riot occurred would be liable for property destroyed r injured in an adjoining city or county, under the circumstances uggested by counsel for appellant, need not now be discussed or ecided as that sort of a case is not now before the court, and the aw is well settled that courts do not entertain objections to the con-titutionality of a statute unless the objection is made by one whose ights have been in some way affected. (Neifing v. Town of Pontiac, 6 Ill. 172; People v. McBride, 234 id. 146.) The case here made by the declaration and by the proofs by the appellee brings 1 the case clearly within the provisions of the statute,—that is, the property in question was destroyed or injured by a nob or riot in the city where the mob assembled or the riot oc-urred.

It is fundamental that the courts will not construe a statute so s to make it unconstitutional if any other reasonable construction an be placed upon it which will make it effectual. (Newland v. Marsh, 19 Ill. 376; People v. Peacock, 98 id. 172.) To hold that he statute in question should be so construed as to make a city or ounty liable for the destruction or injury of property caused by a nob or a riot outside of the limits of the city or county would be o attribute to the legislature the doing of an unreasonable and bsurd thing and something which the legislature clearly could ot have contemplated. This the courts will never do, unless the anguage of the statute is so clear and certain in its terms that no ther reasonable conclusion from the reading thereof can be reached. And even when the literal enforcement of a statute will result in nconvenience and great hardship and lead to consequences which re absurd, the courts will presume no such consequences were in-ended and adopt a construction which is, in its consequences, in ccordance with reason and which will promote the ends of justice and avoid the absurdity. In People v. Harrison, 191 Ill. 257, the ourt, on page 267, said: "When the literal enforcement of a statute would result in great inconvenience and cause great injustice, and lead to consequences which are absurd and which the legislature could not have contemplated, the courts are bound to presume that such consequences were not intended, and adopt a construction which will promote the ends of justice and avoid the absurdity." To the same effect were People v. City of Chicago, 152 Ill. 546, and Crane v. Chicago and Western Indiana Railroad Co. 233 id.

259. We think it clear, therefore, from a consideration of the statute upon which the cause of action in this case is based,
42 said statute should be so construed as not to impose a liability upon a city or county for property destroyed or injured by a mob or riot assembling or occurring outside of the limits and beyond the control of the city or county in which the property was destroyed or injured. If the statute is given such construction, then the objection urged by the appellant against its constitutionality is removed. The Supreme Court of the State of New York, and the Supreme Courts of the State of Pennsylvania and other States in the Union, have each held a statute substantially in the language of our statute constitutional. (Darlington v. State of New York, 31 N. Y. 163; County of Allegheny v. Gibson, 90 Pa. St. 397; 35 Am. Rep. 670.) Our conclusion therefore is that the first contention of the appellant cannot be sustained.

The second contention of the appellant is based upon the supposition that the statute was enacted to guard against injury to the property of the citizen caused by the negligence of the city or the county in which its destruction or injury takes place, in failing to disperse a mob or suppress a riot. The liability imposed by statutes of this kind is not based by the legislature or sustained by the courts upon the theory that the city or the county in which the property is destroyed or injured has been guilty of negligence, as the element of negligence is not the basis upon which the liability rests, but such statutes are enacted by virtue of the police power of the State and are sustained upon the ground of public policy, and have been universally enforced by the courts without regard to the hardship which might arise by reason of their enforcement in particular cases. The question raised in appellant's second contention was raised and passed upon by this court adversely to the contention of appellant in the case of City of Chicago v. Manhattan Cement Co. supra, and was there set at rest. On page 379 of the opinion in that case the court said: "Except that of the State of Maryland, all of the statutes of this character, so far as we can ascertain,
43 like our own, fix the liability of the municipality without reference to its ability or exercise of diligence to prevent the destruction, and that feature has not been considered by any of the courts passing upon the question, as an objection to their validity." And the court in that case quoted with approval the following excerpt from the Gibson case (p. 378): "Under our political system the State grants a portion of its sovereignty to certain municipalities. It clothes them with certain of its powers and exacts from them in return the performance of certain duties. Among the powers granted is that of maintaining a police force. Among the duties exacted is that of preserving the public peace. There is an implied contract between the State and every municipality upon which it bestows a portion of its sovereignty, that such municipality shall preserve the public peace and maintain good order within its borders. The State lends its aid when the local authorities are overborne and a call for assistance is made in the manner pointed out by law. But it is entirely within the power of the sovereign to make such communi-

ties responsible for the preservation of order. The privileges conferred must be taken with such burdens as the law-making power chooses to annex thereto." And again, on page 379: "It may seem a harsh rule to hold a community responsible for the effects of mob violence, which, apparently at least, they had no power to prevent, yet not more so than to hold every inhabitant of the English hundred liable for a robbery of which he knew nothing and had no means of arresting. In both cases it is a police regulation. It is based upon the theory that with proper vigilance the act might and ought to have been prevented." And from the Darlington case, on page 378: "It cannot be doubted but that the general purposes of the law are within the scope of legislative authority. The legislature has plenary power in respect to all subjects of civil government which they are not prohibited from exercising by the constitution of the United States or by some provision or arrangement
44 of the constitution of this State. This act proposes to subject the people of the several local divisions of the State, consisting of counties and cities, to the payment of damages to property in consequence of any riot or mob within the county or city. The policy upon which the act is framed may be supposed to be to make good at the public expense the losses of those who may be so unfortunate as, without their own fault, to be injured in their property by acts of lawless violence of a particular kind which it is the general duty of the government to prevent, and further, and principally, we may suppose, to make it the interest of every person liable to contribute to the public expense to discourage lawlessness and violence and maintain the empire of the laws established to preserve public quiet and social order. These ends are plainly within the purposes of civil government, and, indeed, it is to maintain them that governments are instituted, and the means provided by this act seem to be reasonably adapted to the purposes in view."

We have gone over the questions involved in this case with much care, and have reached the same conclusion which was reached in City of Chicago v. Manhattan Cement Co. supra, where, on page 377, this court said: "Statutes similar to ours have been in force in England, as well as in several of the States in this country, for many years, and have uniformly been upheld by the courts. The constitutional right of legislatures to enact such laws under our form of government has been frequently challenged in courts of last resort, and our attention is called to no case denying that authority."

Finding no reversible error in this record the judgment of the circuit court will be affirmed.

Judgment affirmed.

45 At a Supreme Court, begun and held at Springfield on Tuesday, the First day of December, in the year of our Lord One Thousand Nine Hundred and Eight, within and for the State of Illinois.

Present: James H. Cartwright, Chief Justice; John P. Hand, Justice; Guy C. Scott, Justice; William M. Farmer, Justice; Alonzo K. Vickers, Justice; Orrin N. Carter, Justice; Frank K. Dunn,

Justice; William H. Stead, Attorney General; Warren C. Murray, Bailiff.

Attest:
J. McCAN DAVIS, *Clerk.*

Be it remembered, to-wit, on the Fifteenth day of December, A. D. 1908, the same being one of the days of the term of Court aforesaid, the following proceedings were by said Court, had and entered of record, to-wit:

No. 6209.

FRANK STURGES, Appellee,
v.
CITY OF CHICAGO, Appellant.

Appeal Circuit Court Cook.

And now on this day, this cause having been argued by counsel, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matter and things therein assigned for Error, and now being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid nor in the rendition of the Judgment aforesaid, is there anything erroneous, vicious or defective, and that in that record there is no error: Therefore, it is considered by this Court that the Judgment aforesaid be Affirmed in all things, and stand in full Force and Effect, notwithstanding the said matters and things therein assigned for error. And it is further considered by the Court that the said Appellee recover of and from the said Appellant costs by him in this behalf expended in due course of law.

46 *Authentication of Record.*

SUPREME COURT,
State of Illinois, ss:

I, J. McCan Davis, Clerk of said Court, Do Hereby Certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Frank Sturges vs. City of Chicago and also of the opinion of the court rendered therein as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court, at Springfield this 22nd day of April, A. D. 1909.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

J. McCAN DAVIS,
Clerk Supreme Court.

47 Be it remembered, to-wit, that on the 21st day of April, A. D. 1909, there was duly filed by the appellant in the Office of the Clerk of the Supreme Court of Illinois, a petition for writ of error with assignments of error from the Supreme Court of the United States to the Supreme Court of Illinois addressed to the Hon. James H. Cartwright, Chief Justice of the Supreme Court of Illinois, with the endorsement by the Chief Justice upon the said petition allowing said writ of error, which documents are in words and figures as follows, to-wit:

48 Supreme Court of Illinois.

No. 6209.

FRANK STURGES, Plaintiff (Appellee),
v.
CITY OF CHICAGO, a Municipal Corporation, Defendant (Appellant).

Assignment of Errors and Prayer.

Now comes the above defendant and files herewith its petition for a writ of error, and says that there are errors in the record and proceedings of the above entitled case, and for the purpose of having the same reviewed in the United States Supreme Court makes the following assignment:

The Supreme Court of Illinois erred in holding and deciding the Act of the General Assembly of the State of Illinois, entitled "An Act to Indemnify the owners of property for damages occasioned by Mobs and Riots," approved June 15, 1887, and in force July 1, 1887, to be valid. The validity of said act was denied and drawn in question by the defendant on the ground of its being repugnant to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The said errors are more particularly set forth as follows:

49 The Supreme Court of Illinois erred in that it did not hold and decide said act to be void for the reason that:

Said Act did abridge the privileges and immunities of this defendant as guaranteed by Section 1 of the Fourteenth Amendment of the Federal Constitution;

Said Act violated the provision guaranteeing due process of law, and

Said Act violated the provision guaranteeing the equal protection of the laws.

For which errors the defendant, the City of Chicago, prays that the said judgment of the Supreme Court of the State of Illinois, dated the 15th day of April, 1908, be reversed and a judgment rendered in favor of the defendant City of Chicago and for costs.

EDWARD J. BRUNDAGE,
Corporation Counsel;
ROBERT N. HOLT,
Assistant Corporation Counsel,
Attorneys for the City of Chicago.

50 [Endorsed:] Gen. No. —. Term No. —. In the —— Court. Frank Sturges vs. City of Chicago. Assignment of Errors and Prayer. Filed Apr. 21, 1909. J. McCan Davis, Clerk of Supreme Court. Edward J. Brundage, Corporation Counsel.

51 Be it also remembered that on the 30th day of March, A. D. 1909, an order was duly entered of record by the Hon. James H. Cartwright, Chief Justice of the Supreme Court of the State of Illinois, allowing said writ of error and approving bond for writ of error, in words and figures as follows to-wit:

52 Supreme Court of Illinois.

No. 6209.

FRANK STURGES, Plaintiff (Appellee),
v.
CITY OF CHICAGO, a Municipal Corporation, Defendant (Appellant).

Petition for Writ of Error.

Considering itself aggrieved by the final decision of the Supreme Court in rendering judgment against it in the above entitled case, the appellant, City of Chicago, hereby prays a writ of error from the said decision and judgment to the United States Supreme Court, and an order fixing the amount of a supersedeas bond.

Assignment of errors herewith.

EDWARD J. BRUNDAGE,
Corporation Counsel;
ROBERT N. HOLT,
Assistant Corporation Counsel,
Attorneys for the City of Chicago.

53 STATE OF ILLINOIS,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by the City of Chicago to Frank Sturges in the sum of One thousand Dollars (1,000.00); such bond when approved to act as a supersedeas.

Dated, March 30, 1909.

JAMES H. CARTWRIGHT,
Chief Justice Supreme Court of Illinois.

54 [Endorsed:] Gen. No. —. Term No. —. In the —— Court. Frank Sturges vs. City of Chicago. Petition & Order for Writ of Error. Original. Filed Apr. 21, 1909. J. McCan Davis, Clerk of Supreme Court. Edward J. Brundage, Corporation Counsel.

55 Be it remembered that on the 21st day of April, A. D. 1909, there was duly filed in the office of the Clerk of the Supreme Court of Illinois by City of Chicago an original bond for

writ of error from the Supreme Court of the United States to the Supreme Court of Illinois in words and figures as follows, to-wit:

56 FRANK STURGES, Plaintiff (Defendant in Error),
vs.
CITY OF CHICAGO, Defendant (Plaintiff in Error).

Know all men by these presents: That we, the City of Chicago, a municipal corporation, as principal, and Illinois Surety Company, a body corporate of the State of Illinois, as surety, are held and firmly bound unto Frank Sturges, in the sum of one thousand dollars ($1,000.00), to be paid to the said Sturges, to which payment well and truly to be made we bind ourselves, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 1st day of April, A. D. 1909.

Whereas, the above named plaintiff in error seeks to prosecute its writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Illinois.

Now therefore, the condition of this obligation is such, that if the above named plaintiff in error shall prosecute its said writ of error to effect and answer all costs and damages that may be adjudged if it shall fail to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

CITY OF CHICAGO,
(Sgd.) By FRED A. BUSSE, *Mayor.*

Attest:
JNO. R. McCABE,
[SEAL.] *City Clerk.*

ILLINOIS SURETY COMPANY,
(Sgd.) By JAMES S. HOPKINS,
Acting President.

Attest:
[SEAL.] H. W. WATKINS, *Sec'y.*

O. K.
ROBERT N. HOLT,
Ass't Corp. Counsel.

Bond approved and to operate as a supersedeas.

JAMES H. CARTWRIGHT,
Chief Justice, Supreme Court of Ill.

BUCKLEY, GRAY & MOOR,
Pl'ff Att'ys.

[Endorsed:] Frank Sturges v. City of Chicago. Bond. Copy. Filed Apr. 21, 1909. J. McCan Davis, Clerk of Supreme Court.

57 Be it remembered that on the 21st day of April, A. D. 1909, there was filed in the Office of the Clerk of the Supreme

Court of Illinois an original writ of error which is hereby attached and is in words and figures as follows, to-wit:

58 UNITED STATES OF AMERICA, *ss:*

[SEAL.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Illinois, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law of the said State in which a decision could be had in the said suit between Frank Sturges and the City of Chicago, a municipal corporation, wherein was drawn in question the validity of a statute of said State, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of such its validity; and wherein was drawn in question the construction of certain clauses of the Constitution of the United States, and the decision was against the rights set up and claimed under such clauses of the said Constitution; a manifest error hath appeared to the great damage of the said City of Chicago, appellant, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the
59 same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States the twenty first day of April, in the year of our Lord one thousand nine hundred and nine.

[The Seal of the Circuit Court of the United States for the South'n Dist. Ill.]

JAMES T. JONES,
Clerk, Circuit Court, United States for Southern Division of Southern District of Illinois.

Allowed:

JAMES H. CARTWRIGHT,
Chief Justice Supreme Court of Illinois.

60 [Endorsed:] Gen. No. —. Term No. —. In the —— Court. Frank Sturges vs. City of Chicago. Writ of Error. Filed Apr. 21, 1909. J. McCan Davis, Clerk of Supreme Court. Edward J. Brundage, Corporation Counsel.

61 *Certificate of Lodgment.*

SUPREME COURT,
State of Illinois, ss:

I, J. McCan Davis, Clerk of said Court, do hereby certify that there was lodged with me as such Clerk on April 22, 1909, in the matter of Frank Sturges vs. City of Chicago. No. 6209.

1. The original bond of which a copy is herein set forth.

2. Two copies of writ of error, as herein set forth—one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Springfield, Ill., this 24th day of April, A. D. 1909.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

J. McCAN DAVIS,
Clerk Supreme Court of Illinois.

62 UNITED STATES OF AMERICA, *ss:*

To Frank Sturges, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Illinois, wherein the City of Chicago, a municipal corporation of the State of Illinois is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, The Honorable James H. Cartwright, Chief Justice of the Supreme Court of the State of Illinois, this twenty-first day of April, A. D. 1909.

JAMES H. CARTWRIGHT. [L. S.]
Chief Justice of the Supreme Court of Illinois.

CHICAGO, ILLINOIS, *April* 22, 1909.

We, attorneys of record for the defendant in error in the above entitled cause, hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the United States.

BULKLEY, GRAY, MORE,
Att'ys for Frank Sturges.
ALMON W. BULKLEY.

63 In the Supreme Court of Illinois.

FRANK STURGES
vs.
CITY OF CHICAGO.

I, J. McCan Davis, Clerk of said Supreme Court of the State of Illinois, Do Hereby Certify that on the Twenty-first day of April, A. D. 1909, a copy of the foregoing Citation was duly lodged in my office in Springfield, in the State of Illinois.

Witness, my hand and the seal of said Court, at Springfield, this twenty-first day of April, A. D. 1909.

J. McCAN DAVIS,
Clerk Supreme Court of Illinois.

64 [Endorsed:] Filed Apr. 21, 1909. J. McCan Davis, Clerk of Supreme Court.

65 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Illinois, ss:

In obedience to the commands of the within writ I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Illinois, in the City of Springfield, this 22nd day of April, A. D. 1909.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

J. McCAN DAVIS,
Clerk Supreme Court of Illinois.

Endorsed on cover: File No. 21,635. Illinois Supreme Court. Term No. 208. The City of Chicago, plaintiff in error, vs. Frank Sturges. Filed April 29th, 1909. File No. 21,635.

8

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1911

No. [redacted] 39

THE CITY OF CHICAGO,
Plaintiff in Error,
vs.
FRANK STURGES.

In Error to the Supreme Court of the State of Illinois.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

EDWARD J. BRUNDAGE,
Corporation Counsel,
ROBERT N. HOLT,
Assistant Corporation Counsel,
Attorneys for Plaintiff in Error.

GUNTHORP – WARREN PRINTING CO., CHICAGO

FILED _____

IN THE

upreme Court of the United States.

OCTOBER TERM, 1910.

No. 208

THE CITY OF CHICAGO,
Plaintiff in Error,
vs.
FRANK STURGES.

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n Error to the Supreme Court of the State of Illinois.

STATEMENT OF THE CASE.

This case was instituted in the Circuit Court of ook County, Illinois, May 24, 1904, and was regu-rly reached for trial before Judge Stough June 18, 908.

It is an action brought to recover damages suf-ered by the plaintiff because of property alleged o have been destroyed by a mob or riot within the ity of Chicago.

The right to recover is based upon a statute of he State of Illinois, approved June 15, 1887, in

force July 1, 1887, entitled "An Act to Indemnify the Owners of Property for Damages occasioned by Mobs and Riots" (S. & C. Illinois Statutes, Chap. 38, Secs. 406 to 412 inclusive), which statute is as follows:

"AN ACT to indemnify the owners of property for damages occasioned by mobs and riots.

1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly,* That whenever any building or other real or personal property except property in transit, shall be destroyed or injured in consequence of any mob or riot composed of twelve or more persons, the city, or if not in a city then the county in which such property was destroyed, shall be liable to an action by or in behalf of the party whose property was thus destroyed or injured, for three-fourths of the damages sustained by reason thereof.

Action, How Brought—Judgment.) 2. Such action may be brought in the form of an action on the case, or other appropriate action, and whenever any final judgment shall be secured against any such city or county in any such action, the same shall be paid in due course as in case of other judgments.

When Entitled to Recover.) 3. No person or corporation shall be entitled to recover in any such action if it shall appear on the trial thereof that such destruction or injury of property was occasioned, or in any way aided, sanctioned or permitted by the carelessness, neglect or wrongful act of such person or corporation; nor shall any person or corporation be entitled to recover any damages for any destruction or injury of property as aforesaid, unless such party shall have used all reasonable diligence to prevent such damage.

Action by Party Against Persons Engaged In Riot—Lien of City, Etc.) 4. Nothing in this

act shall be construed to prevent any person or corporation whose property has been injured or destroyed in consequence of any mob or riot, from having or maintaining an action or actions against any person or persons, engaged or in any manner participating in such mob or riot, for the recovery of the damages sustained thereby: Provided, that when such city or county, shall have paid any part of such damage, such city, or county, making such payment shall have a lien to the amount so paid upon any judgment or claim, against any person or persons engaged in, or in any manner participating in such mob or riot, together with the right and power to enforce and collect such judgment or claim, and when such city or county shall have been reimbursed the money so paid by it, such portion of such judgment or judgments, or claim or claims remaining unpaid shall then revert to, and become the property of the original owner thereof, and such owner shall have the right to enforce and collect the same.

Action by City or County Against Persons Engaged In Riot.) 5. It shall be lawful for the city or county against which a judgment, or judgments, for damages shall be recovered under the provisions of this act, to bring an action, or actions against any person or persons engaged or in any manner participating in said mob or riot, for the recovery of the amount of said judgment or judgments and costs, and such action shall not abate or fail by reason of too many or too few parties defendant being named therein; the same shall to all intents and purposes be treated as an action of trespass brought by the owners of such property, except that the statute of limitations as to such action shall not begin to run against said city or county until its liability is fixed by judgment as hereinbefore provided.

Notice of Claim of Damages—When Action Shall Be Brought.) 6. No action shall be main-

tained under the provisions of this act, by any person or corporation whose property shall have been destroyed or injured as aforesaid, unless notice of claim for damages be presented to such city or county within thirty days after such loss or damage occurs and such action shall be brought within twelve months after such destruction or injury occurs, but nothing in this act shall be construed as authorizing any recovery by the United States, the State of Illinois, or any county, for the destruction of, or injury to property by mobs or riots.

When City or County Settles Claim.) 7. Any city or county may settle with, and pay, the owner of any such property the damages so sustained; and any such city or county which shall have paid any sum under the provisions of this act, whether by voluntary settlement or otherwise, may recover the same with all costs paid by it from any or all the persons engaged in the destruction or injury of the property so paid for."

Starr & Curtis Illinois Statutes, Chap. 38, Secs. 406-412.

This act has been held constitutional by the Supreme Court of Illinois in three cases: *City of Chicago* v. *Manhattan Cement Co.,* 178 Ill., 372; *Dawson Soap Company* v. *City of Chicago,* 234 Ill., 314, and in this case.

This case involves every point raised by the City of Chicago in the Dawson Soap Company case, *supra,* as well as points additional to those referred to in the Dawson Soap Company case. The assignments of error were made sufficiently broad in the present case to raise all of these points so that it would not be necessary to perfect two appeals in

order to secure the decisions of your Honors upon the constitutionality of this act.

It is admitted by the City of Chicago that if this act is constitutional that Sturges is entitled, under the evidence, to his judgment.

The City of Chicago submitted several propositions of law to be marked "held" by the court, each of which propositions was marked "refused."

The second proposition submitted by the city was as follows:

> "The Act of the General Assembly of the State of Illinois entitled 'An Act to Indemnify the Owners of Property for Damages occasioned by Mobs and Riots,' approved June 15, 1887, and in force July 1, 1887, and under which this action is brought contravenes and conflicts with the provisions of the Constitution of the United States and is unconstitutional and void."

The court refused to hold this proposition as law in the decision of the case and to mark thereon the word "held," but marked thereon the word "refused," to which action of the court the city duly excepted. (Rec., 19.)

Another provision of law submitted by the city was as follows:

> "The Act of the General Assembly of the State of Illinois entitled 'An Act to Indemnify the Owners of Property for damages occasioned by Mobs and Riots,' approved June 15, 1887, and in force July 1, 1887, and under which this action is brought is in conflict with and in contravention of the Fifth Amendment of the Constitution of the United States and the First Section of the Fourteenth Amendment of the Constitution of the United States and is unconstitutional and void."

The court refused to hold said proposition as law and to mark thereon the word "held" but marked thereon the word "refused," to which action of the court the city duly excepted. (Rec., 19.)

The city also submitted a proposition of law as follows:

> "That upon consideration of the pleadings and all of the evidence the plaintiff is not legally entitled to recover."

This proposition the court refused to hold and to mark "held" but marked the same "refused," to which action of the court the city duly excepted. (Rec., 19.)

Thereupon the court found the issues for the plaintiff, Sturges, and against the City of Chicago, from which finding an appeal was duly perfected to the Supreme Court of the State of Illinois which Supreme Court rendered a decision affirming the finding of the trial court. From this decision of the Supreme Court of the State of Illinois this writ of error is sued out to the Supreme Court of the United States. (Rec., 23.)

It is claimed that the statute in question is in conflict with and in contravention of the first section of the Fourteenth Amendment of the Constitution of the United States and is unconstitutional and void and that this judgment should, therefore, be reversed. The act discriminates between cities and villages and towns contrary to the provisions of the constitution. The act gives remedies to certain property owners of counties which it denies to others. The law makes the location of the property

destroyed and not the location where the riot occurs the criterion as to who should be punished. The law conclusively presumes questions of fact as to the negligence of the city and denies the right to be heard as to a material element of defense.

The assignments of error as set forth are as follows:

> "The Supreme Court of Illinois erred in that it did not hold and decide said act to be void for the reason that said act did abridge the immunities of the City of Chicago as guaranteed by Section 1 of the Fourteenth Amendment of the Federal Constitution;
>
> Said act violated the provision guaranteeing due process of law, and
>
> Said act violated the provision guaranteeing the equal protection of the laws." (Rec., 29.)

For which errors the City of Chicago prays that the judgment herein be reversed and the judgment be rendered in favor of the City of Chicago and for costs.

BRIEF.

Act of June 15, 1887:

> "Section 1. Be it enacted by the People of the State of Illinois, Represented in the General Assembly: That whenever any building or other real or personal property, except property in transit, shall be destroyed or injured in consequence of any mob or riot composed of twelve or more persons, the city, or if not in a city, then the county in which such property was destroyed shall be liable to an action by or in behalf of the party whose property was thus destroyed or injured for three-fourths of the damages sustained by reason thereof."

Starr & Curtis' Statutes, Chapter 38, Section 406,

Fourteenth Amendment, United States Constitution:

> "Section 1. * * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The "Equal Protection of the Law" covers privileges conferred as well as liabilities imposed.

> Guthrie's Fourteenth Amendment to the Constitution of the United States, Lecture 4, p. 111.
>
> *Hayes* v. *Missouri,* 120 U. S., 68.

Laws inflicting penalties should operate equally on all citizens equally situated.

> *Bailey* v. *People,* 190 Ill., 28.

An arbitrary classification of persons or corporations to be affected does not render a law applying to one such class general in character.

Braceville Coal Co. v. *People,* 147 Ill., 66.
Eden v. *People, etc.,* 161 Ill., 296.
Gulf, Colorado, &c., Ry. v. *Ellis,* 165 U. S., 150.
Frorer v. *People,* 141 Ill., 171.
Millett v. *People,* 117 Ill., 294.
Harding v. *People,* 160 Ill., 459.
People v. *Martin,* 178 Ill., 611.
People v. *Knopf,* 183 Ill., 410.
Matthews v. *People,* 202 Ill., 389.

Where a general law can be made applicable a special law is unconstitutional.

Gulf, Colorado & Ry. v. *Ellis,* 165 U. S., ~~510.~~ 150.
Badenoch v. *City of Chicago,* 222 Ill., 72.
Bailey v. *People,* 190 Ill., 28-34.
Hibbard & Co. v. *City of Chicago,* 173 Ill., 91.
People v. *Cooper,* 83 Ill., 585.
People v. *Knopf,* 183 Ill., 410.
People ex rel. v. *Meech,* 101 Ill., 200.

And cases cited under arbitrary classification.

Municipal corporations proper, and *quasi* municipal corporations distinguished.

4th ed., Dillon on Municipal Corporations, Vol. 1, Chapter 2, Section 23, p. 42.

Due process of law requires that a party be given an opportunity to be heard on every question of fact or liability.

Ohio-Miss. Ry. Co. v. *Lackey,* 78 Ill., 55.

Zeigler v. *S. & N. A. R. R. Co.*, 58 Ala., 594.
Hager v. *Reclamation Dist.*, 111 U. S., 701.
Jensen v. *Ry. Co.*, 6 Utah, 253.
D. & R. G. Co. v. *Outcalt*, 2 Colo. App., 395.
Wadsworth v. *U. P. Ry. Co.*, 18 Colo., 600.
Cateril v. *U. P. Ry. Co.*, 2 Idaho, 540.
Bielenberg v. *Montana U. Ry. Co.*, 8 Mont., 271.
Thompson v. *M. P. Ry. Co.*, 8 Mont., 279.
Schenck v. *U. P. Ry. Co.*, 5 Wyo., 430.
East Kingston v. *Tolle*, 48 N. H., 57.
Stoudenmire v. *Brown*, 48 Ala., 699.
Street v. *City of N. O.*, 32 La. Ann., 577.

Due process of law requires only what is demanded by the usual general law, according to the nature of the particular matter in hand. It will not tolerate unusual or arbitrary actions.

Holden v. *Hardy*, 169 U. S., 366.
Justice Bradley in *Davidson* v. *New Orleans*, 96 U. S., 97.

Where the void provisions in a statute cannot be eliminated without affecting the remaining portions the whole statute becomes void.

Cooley on Constitutional Limitations, pp. 178, 179.
D. & R. G. R. R. Co. v. *Outcalt*, 2 Colo. App., 395.

A corporation is a person within the meaning of the equal protection provision of the Fourteenth Amendment.

Southern Ry. Co. v. *Greene*, 216 U. S., 400.

Equal protection means subjection to equal laws applying alike to all in the same situation.

Southern Ry. Co. v. *Greene,* 216 U. S., 400.

The province of construction lies wholly within the domain of ambiguity.

Hamilton v. *Rathbone,* 175 U. S., 414, at p. 421.

Ottawa Gas Light & Coke Co. v. *Downey,* 127 Ill., 201.

Sedgwick on Statutes, Section 271.

Willford v. *Snyder,* 37 U. S., 524.

ARGUMENT.

That part of the Act of June 15, 1887, to which we desire to direct your attention is contained in the first section which reads:

> "That whenever any building or other real or personal property, except property in transit, shall be destroyed in consequence of any mob or riot composed of twelve or more persons, the city, or if not a city, then the county in which such property was destroyed shall be liable to an action by, or in behalf of the party whose property was thus destroyed or injured for three-fourths of the damages sustained by reason thereof."
>
> *Section* 406, *Chap.* 38, *Starr & Curtis' Statutes.*

THE ACT DOES NOT AFFORD EQUAL PROTECTION OF THE LAW.

The reasons underlying section 22 of article 4 of the Illinois State constitution and the reasons underlying the provisions of the first section of the Fourteenth Amendment of the Federal constitution are nearly analogous.

The Illinois statute providing for the recovery of damages resulting from mob violence is very peculiar in its character. While the laws of other states, in many instances, provide for the recovery of such damages, yet, each of said statutes is general in character.

Some make the county liable as in Pennsylvania.

Section 2 of the Pennsylvania statute provides that where property is destroyed in consequence of any mob or riot, the person interested in and owning said property may bring suit against the county for the recovery of such damages.

2 *Brightly's Penn. Digest,* 1869.

Some make the town liable as in New Hampshire. Section 16 of the New Hampshire Act provides that if persons riotously assemble and injure property, the town within the limits of which the property is situated shall be liable for damages.

Public Statutes (1854) *of New Hampshire,* page 154, secs. 13 and 14.

A similar provision making the town liable is set forth in the Revised Statutes of Maine, sec. 15, p. 901.

The New York statute provides that the city or county shall be liable, but does not limit the property owner in a city to his action against the city.

The Kansas statute makes all incorporated cities and towns liable.

The California statute makes every municipal corporation responsible, as does the statute of Louisiana.

We admit that it is proper for the legislature to pass general enactments uniform in their character, making municipal corporations liable for a portion of the damages resulting from the destruction of property by mobs or riots.

We find fault, however, with the Act of the Illinois legislature in that the same is not general in

character, but is based upon arbitrary discriminations, both as between municipal corporations and also as between individual citizens of counties, which render the act vicious and void.

In the State of Illinois, local government is delegated to municipalities known as cities, villages and towns. These exercise identically the same powers.

Starr & Curtis Illinois Statutes, Chap. 24, Art. V.

The only difference between these municipalities is in their method of organization; cities, acting through a common council of aldermen and a mayor, where villages act through a board of trustees and the president thereof, while towns are organized under an old law and act through trustees, but have the same functions as cities and villages.

The mere fact that a municipality has adopted the form of government provided for cities affords no reasonable basis for conferring upon it benefits and privileges withheld from villages of equal population and differing from cities only in that they have not incorporated as cities.

People ex rel. City of Danville v. *Fox,* Advance Sheets Illinois Rep., Vol. 248, p. 402; 93 N. E. Rep., 302.

This case was decided in December, 1910.

There are many villages in the State of Illinois having larger population than cities. In order to show the relative size of cities and villages and the conditions as they are in different counties, we have taken the figures of population relative thereto from

certain cities and villages based upon the Federal census of 1900.

There are 11 cities in Illinois each having less than one thousand inhabitants. We compare each in the following table with a village taken from the same county:

TABLE I.

City	Population of City.	County	Population of Village.	Village.
Ashley	953	Washington	544	Okawville.
Ava	984	Jackson	3,318	Carbondale.
Chrisman	905	Edgar	1,049	Kansas.
Creal Springs	940	Williamson	1,749	Carterville.
Dallas City	970	Hancock	1,149	Augusta.
Grand Tower	881	Jackson	3,318	Carbondale.
Macon	705	Macon	714	Blue Mound.
Oneida	785	Knox	633	Altona.
New Boston	703	Mercer	826	Sherrard.
Windsor City	866	Shelby	1,478	Moweaqua.
Yates City	650	Knox	663	East Galesburg.

TABLE II.

City	Population of City	County.	Population of Village	Village.
Sycamore	3,653	De Kalb	5,904	De Kalb.
Grand Tower	881	Jackson	3,318	Carbondale.

TABLE III.

Some counties have few cities with several large villages. Compare the following:

DU PAGE COUNTY.

City.	Population.	Villages over 1,000	Population.
Naperville	2,629	Wheaton	2,345
		West Chicago	1,877
		Hinsdale	2,578
		Downer's Grove	2,103
		Elmhurst	1,728

GRUNDY COUNTY.

City.	Population.	Village over 1,000	Population.
Morris	4,273	Braceville	1,669
		Carbon Hill	1,252
		Coal City	2,607
		Gardner	1,036

HENRY COUNTY.

City.	Population.	Villages over 1,000.	Population.
Kewanee	8,382	Galva	2,682
		Geneseo	3,356
		Cambridge	1,345

Table IV.

In this table we set out a condition in St. Clair County, which has three cities and three villages which are so near in number of population as to make them communities of the same general character.

ST. CLAIR COUNTY.

Cities.	Population.	Villages.	Population.
Lebanon	1,812	Brooklyn	1,019
O'Fallon	1,267	Freeburg	1,214
Mascontah	2,171	Millstadt	1,172

There are about 110 villages in Illinois each of which has a population of over one thousand. Many of them, such as Oak Park, De Kalb, Carbondale, Maywood and Harlem, are large municipalities, and as such are well policed. There are 140 cities in Illinois having a population of less than three thousand each, and 11 cities in Illinois having a population of less than one thousand. The first section of the act herein provides that

> "* * * whenever any building or other real or personal property, except property in tran-

sit, shall be destroyed or injured in consequence of any mob or riot composed of twelve or more persons, *the city, or if not in a city then the county in* which such property was destroyed, shall be liable to an action by or in behalf of the party whose property was thus destroyed or injured, for three-fourths of the damages sustained by reason thereof."

We contend that this section of the act discriminates in favor of villages and towns and against cities. If the legislature desired to make any of such municipal corporations liable for such injury, then it must make all municipal corporations of the same character and exercising identically the same functions liable for such injury. The legislature has no more right to say that a community organized as a city shall be liable for such injury, and a community organized as a town or village shall not be liable for such injury, than it would have to say that railroads organized as corporations shall equip their trains with air brakes under penalty, and railroads owned by individuals or organized as partnerships shall not be required to equip their trains with air brakes under penalty.

There are no essential underlying matters which differentiate cities, towns and villages. They are merely clothed in different dress. It would be no more logical to say that they differ from each other than it would to say that John Jones and William Smith differ from each other in their fundamental liabilities and rights merely because their clothing differed in color or texture. Or, again, to say that families differ from each other in their fundamental

rights and liabilities merely because the one family lived in a brick house and the other in a frame structure.

The Act of 1887 is limited in its application to cities and excludes towns and villages, while it includes, under some conditions, counties. Such limitation to cities is purely arbitrary and not based upon any inherent difference in conditions between communities of 2,000 inhabitants under a city form of government and communities of like population under village or township government. There is nothing in the mere form of the municipal organization which renders its inhabitants, who constitute the voluntary organization, less capable of self government, or of taking such police measures as may be necessary for the control and suppression of mobs and riots. The classification is, therefore, a mere arbitrary selection and it nowhere appears that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification.

In *Gulf, Colorado and Santa Fe Railway* v. *Ellis*, 165 U. S., 150-155, 159, 160, 165, Mr. Justice Brewer, speaking for the court, said:

> "Yet it is equally true that such classification cannot be made arbitrarily. The state * * * may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can

never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection."

There is no statutory provision requiring villages or towns to adopt the city form of government. The act should, in order to make it uniform in its terms, have included all municipal corporations of the character of cities, villages or towns by whatever form of government they might be controlled. The mere difference in number of inhabitants is often subject to sudden change. We well know that in a fortnight, a town or village may double or treble the number of its inhabitants and it is not compulsory upon any town or village to adopt the city form of government, the only requirement for so doing being that said town or village shall have not less than 1,000 inhabitants. (Ch. 4, sec. 4, Hurd's Rev. St. 1901, p. 276.)

Looking at this section of the act from another standpoint, we contend that the legislature has no more right to say that a citizen living within a

county outside of a city may sue the county for damages resulting from mobs or riots but that a citizen within a city and within the same county shall not have such right or privilege to sue the county than the legislature has the right to say a householder who lives in a brick house shall quarantine in case of scarlet fever and a householder who lives in a wooden house shall not quarantine for scarlet fever. Both of these citizens contribute to the county treasury, and an act which gives a part of the citizens of a county a right to sue the county and denies the right to other citizens of the county is necessarily void. It is no argument to say that he has been given another right which may or may not be equivalent; he is entitled to the same right. His city may be a bankrupt; the resident of the city may be placed where he has to sue a bankrupt city, although at the same time the county would be perfectly able to recompense him for all damages if he, like his neighbor, across the municipal line could bring his action against the county.

Such classification is arbitrary, not based on any reasonable distinction and makes the enactment void as special legislation and as legislation which denies to certain persons within the jurisdiction the privileges which it gives to other citizens within the same jurisdiction.

Such arbitrary classification would admit of a law requiring certain specified corporations to pay their wages weekly. Such a law, however, was declared unconstitutional in *Braceville Coal Co.* v. *People*, 147 Ill., 66. Such classification would admit of a stat-

ute forbidding barbers, and barbers only, to keep open their shops and work at their trade on Sunday; but the court declared such a statute void in *Eden* v. *People,* 161 Ill., 296.

In most instances, the provisions of the first section of the Fourteenth Amendment to the United States constitution are brought in question in cases which relate to liabilities imposed. The constitutional provisions, however, extend equally to privileges conferred.

> "The 'equal protection of the laws' has been authoritatively declared to mean that all persons subjected to legislation 'shall be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.'"
>
> *Guthrie on "14th Amendment to the Constitution, Lecture* 4, page 111.
> *Hayes* v. *Mo.,* 120 U. S., 68, 71, 72.

Among the privileges which should be equally granted to the citizens within the same county, is an equal right to sue for the protection of their property.

While some states have laid down the rule that a statute of this character should be liberally construed, judges have questioned the validity of that rule of construction. There is no doubt but that the statute in question is void, no matter whether it is subjected to a liberal or strict construction. The statute as passed in Illinois is penal in character. From this it would appear that the idea uppermost in the mind of the legislature was the idea of punishment for neglect in suppressing mobs and riots.

Since it is a penal statute it should be construed according to strict rules of construction.

Laws which inflict penalties should act equally on all citizens equally situated. This law does not act equally upon the citizen of the city of 2,000 inhabitants and the citizen of the village of 2,000 inhabitants in the same county. The taxpayer of the city is taxed for the damage from riots in both the city and the village. The taxpayer of the village is not taxed for the damage from riots in the city.

Bailey v. *People, &c.*, 190 Ill., 28.

Under the Illinois law, cities, towns and villages are municipal corporations proper, in that they are created in each instance, either at the direct solicitation or by the free consent of the persons composing them, for the promotion of their own local and private advantage and convenience. The county organizations are created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration without the particular solicitation, consent or concurrent action of the people who inhabit them.

Dillon on Mun. Corp., Ch. 2, sec. 23, page 42.

Let us consider that there are four communities within the same county, each of 1,200 inhabitants, two organized as cities, one of which is bankrupt, and two organized as villages. Assume that a property owner in each has $500 worth of property destroyed by a mob, for which he desires to recover. Each person as a taxpayer of the county elects to

look to the county to reimburse him, two of them find themselves barred by an arbitrary act of class legislation which is based upon no difference between the character of the communities in which they live which may be said to constitute a just and proper basis for the attempted classification. One of the two is further handicapped because his city is bankrupt.

Let us carry the matter a little further and consider the communities as a whole. The property within the cities must pay taxes for reimbursing each of the four cases of injury. The inhabitants of the villages, however, under the provisions of the act in question, are fortunate enough to escape by having to pay taxes only to pay the damage in the case of the two property owners who live within the villages. Why this unreasonable discrimination? Either this act should limit the liability in every case to the municipal corporation within whose limits the property was destroyed, or it should fix the liability in every case upon the county within whose limits the property was destroyed.

In *Badenoch* v. *City of Chicago*, 222 Ill., 72, the court, in passing upon the statute subjecting certain municipal corporations to attachment and garnishment, at page 81, says:

> "It is also urged that the Act of May 11, 1905, is special legislation and unconstitutional in this, that it places certain burdens upon the municipal corporations named in the title of the act from which other municipal corporations are exempted. * * *
>
> It is apparent from the terms of the act that it does not apply to the officers and employes

> of all municipal corporations created under the laws of this state, and unless some valid ground can be pointed out justifying the omission from the act, of the officers and employes of municipal corporations of the same class with those included within the act, which we think cannot be done, the contention that the act is special legislation and therefore, unconstitutional, would seem to be well founded."

Why should not one owning property in a city of 2,000 inhabitants be entitled to sue the county for the damage done his property by a mob, the same as one who lives in a village of 2,000 inhabitants covering equal territory and paying equal taxes? The right to sue is a privilege, and discrimination between citizens of the same county in regard to their right to sue deprives some of their constitutional rights without due process of law.

> "Due process of law means a general public law, legally enacted binding upon all members of the community under all circumstances and not partial or private laws affecting only the rights of private individuals or classes of individuals. An enactment which deprives one class of persons of the right to acquire and enjoy property or to contract with relation thereto in the same manner as others under like conditions and circumstances are permitted to acquire and enjoy property or contract with relation to is not comprehended within the true meaning of the words due process of law, and is prohibited by the provisions of section 22 of Art. 4 of the Constitution of 1870."
>
> *Bailey* v. *People,* 190 Ill., 28-34.

The general rule governing legislative bodies in reference to general and special laws or ordinances is set forth in *Hibbard* v. *City of Chicago,* 173 Ill.,

91-98, where the court, in passing upon the validity of a city ordinance which granted special privileges, says:

> "* * * Whatever is prohibited by the constitution of the state from being done by the legislature cannot be done directly through any other body and an ordinance of a municipal corporation must be in harmony with the general laws and constitution of the state and whenever such ordinance comes in conflict with the constitution it is void.
>
> A municipal corporation cannot confer power upon one person to do an act which is prohibited to another having an equal right to do the same act, and ordinances cannot favor or discriminate against any person or class of persons, but must be uniform and of general operation within the corporation limits."

It being a proposition of law that power cannot be conferred by statute upon one person to do an act which is prohibited to another similarly situated having an equal right to do the same act, then a statute giving power to one property owner in the county (who lives without the limits of a city) to sue the county for damages to his property resulting from mob violencce shows arbitrary discrimination and is class legislation because the same right is denied to the property owner and taxpayer of the county who lives within the limits of a city.

It is no justification for such legislation to say that the citizen within the city had a distinct and separate right to sue the city for the loss of his property from mob violence. The resident of the city is entitled to the same right, not to a different right which may or may not prove equally as efficient or convenient.

The city may be bankrupt, and the county may be in better condition to pay debts and various other considerations might move the citizen to seek his remedy against the county.

We submit that the property owner in a city of 1,500 inhabitants stands in the same relation, under the same conditions and the same circumstances relative to the county as does the inhabitants of a village or town of 1,500 inhabitants as such. Under this statute, he is denied a privilege or liberty which is allowed to other citizens of the county. The act, therefore, is in conflict with the principles laid down in *Frorer* v. *The People*, 141 Ill., 171-186.

> "It is not doubted that laws may be enacted, properly, and without infringing this section of the consitution, which, by reason of peculiar circumstances, may affect some persons or classes of persons only, who were not before affected by such restrictions; but in such instances the circumstances must be so exceptional as to leave no others affected in precisely the same way upon whom a general law could have effect."
>
> *Frorer* v. *The People*, 141 Ill., 171-181.

In *Millett* v. *People*, 117 Ill., 294, the court quotes with approval from Cooley's Const. Lim., as follows:

> "Distinctions in these respects should be based upon some reason which renders them important, like the want of capacity in infants and insane persons; but if the legislature should undertake to provide that persons following some specific lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permis-

sible to others, it can scarcely be doubted that the act would transcend the due bound of legislative power, even if it did not come in conflict with the express constitutional provisions. The man or the class forbidden the acquisition or enjoyment of property in the manner permitted to the community at large, would be deprived of *liberty* in particulars of primary importance to his or their pursuit of happiness." Cooley's Const. Lim. (1st ed.), 391.

It may be said by the defense that a provision bearing equally and uniformly upon all cities constitutes general legislation. But, we ask, what important distinction differentiates between the city and a town or village? Is it wealth, is it number or density of population, is it territorial extent? They may be equal in wealth, equal in number and density of population, equal in territorial extent. They may each equip and maintain an equally large and efficient police or constabulary force. What important particulars then, may be said to exist that differentiates the one municipal corporation named a city, from the others?

In the case of *Harding* v. *People*, 160 Ill., 459, at page 465, the court says:

> "Each person [corporation] subject to the laws, has a right that he shall be governed by general, public rules. Laws and regulations entirely arbitrary in their connection, singling out particular persons not distinguished from others in the community by any reason applicable to such persons, are not of that class. Distinctions in rights and privileges must be based upon some distinction or reason not applicable to others. In *Braceville Coal Co.* v. *People*, 147 Ill., 66, it is said (p. 72): 'And it is only when such distinctions exist that differentiate, in im-

> portant particulars, persons or classes of persons from the body of the people, that laws having operation only on such particular persons or classes of persons have been held to be valid enactments.' "

What distinction as regarding the control of mob violence differentiate between the old Village of Hyde Park, the former Town of Lake, the present Village of Oak Park and the City of Evanston?

In the case of *People* v. *Martin*, 178 Ill., 611, the court passed upon an act entitled:

> "An act to provide for the division of incorporated Towns."

It was urged (see opinion, 623), that the act applied to every "incorporated town" in the state; that its provisions bore equally and uniformly upon all such incorporated towns, and affected in a general and uniform manner the territory and inhabitants of all such towns, and therefore, the act was a general law within the meaning of the constitution.

In discussing the basis for the classification, the court on p. 624, say:

> "The ground of the classification bears no relation whatever to the purposes and objects towns under township organization are created to accomplish and subserve, and marks no relative or pertinent distinction in the situation or circumstances of the territory or the inhabitants of such proposed towns and other lawfully organized towns under township organization system. It furnishes no reason why the inhabitants of these disconnected areas of territory should be granted a peculiar and special right to become organized as towns under the township organization system, and to employ and exercise the powers and functions of such towns,

> when the like right and privilege is denied to the like number of inhabitants of other equal areas of territory under conditions and circumstances in no material respect dissimilar. To adopt such classification is but to arbitrarily create a special class of political and civil subdivisions of counties unknown to and unauthorized by the general laws of the state, in contravention of the spirit and letter of the organic law of the state."

In the case at bar, we might equally well argue that there is nothing that furnishes any reason why the inhabitants of villages or towns should be granted a peculiar and special exemption from the duties imposed by the act now under consideration, or why they should not be required to empower and exercise the powers and functions necessary to suppress mob violence under the same penalties that are provided for cities. When the duty and responsibility is placed upon the inhabitants of the one, why should not a like duty and a like responsibility be placed upon the inhabitants of the other, which may be equal in wealth, number of inhabitants and extent of territory, and in fact exist for like purposes practically under like conditions and circumstances. Is not the classification so arbitrary as to create a special class of municipal corporations, unknown to and unauthorized by the general laws of the state and in contravention of the spirit and letter of the organic law?

> "In the case of *People* v. *Cooper*, 83 Ill., 585, the city tax act which was under consideration was held to be void because the prohibition against special and local laws extends to provisions for the levy and collection of taxes by

> municipalities. It was said that if the result of an act would be to establish dissimilarity in the powers and modes of different cities in the levy and assessment of taxes, it was forbidden by the constitution, *and that all legislation affecting the powers of cities, towns or villages must be by general laws.*"
>
> *People* v. *Knopf*, 183 Ill., 410-419.

We can, with equal force, argue that all legislation affecting the duties of cities, towns or villages must be by general laws.

In the case of *People* v. *Knopf, supra,* at p. 420, the court in discussing the classification in *People* v. *Martin, supra,* say:

> "This was upon the ground that the mere fact of previous location formed no basis for classification, and the rule is that a classification cannot be adopted arbitrarily upon a ground which has no foundation in difference of situation or circumstances of the municipalities placed in the different classes. There must be some reasonable relation between the situation of municipalities classified and the purposes and objects to be attained. There must be something in the nature of things, which in some reasonable degree accounts for the division into classes. By this act restrictions are put upon cities, townships, school districts and other municipal corporations simply because they are within Cook County, which is the only county in the state with a population of more than 125,000. There can be no reason, in the nature of things, why a city, village, school district or other public or *quasi* public corporation in that county should be deprived of powers that a similar corporation situated in some other county is permitted to exercise. It is an arbitrary and unnatural classification of municipalities not different in

population, needs or requirements and exercising the same general powers in other respects. For instance, the municipality of Evanston, with the same duties and responsibilities, exercising the same functions and with the same needs as cities of similar population throughout the state, is denied the powers which are allowed to others. The Cities of Quincy, Springfield, Joliet, Aurora, Rockford, and others of that class, of about the same population as Evanston, are free from the restrictions of this act as to indebtedness and the levy of taxes. So, also, there are villages in Cook County of lesser population corresponding in size with other municipal corporations all over the state and which have no greater responsibilities. The fact that some such villages are in Cook County affords no ground for a restriction upon them, while others of the same class outside of the county may incur an indebtedness of five per cent. of the equalized assessment and may levy taxes to the full limit prescribed by general laws. There is no escaping the conclusion that the provisions of section 49 above quoted are void."

Arbitrary divisions into classes are not countenanced by the law. There must be a rational basis in the law or justice for the division of municipal corporations into those which are cities and those which are not cities. Where the language is so broad as to include not only those which are large or small, rich or poor, well policed or poorly policed, it becomes so broad as to leave nothing but an arbitrary line of demarcation upon the one side of which is a heavy liability and upon the other side of which is no liability. To illustrate: the citizens of Evanston must pay taxes for the damage done by the mob in Oak Park, which is a village. The citizens in Oak Park pay no taxes for damage done to property in-

jured by mobs in Evanston, although both are in the same county. In connection with this matter, we refer, without extended quotation to the reasoning in *Matthews* v. *People,* 202 Ill., 389-400.

The case of *People ex rel.* v. *Meech,* 101 Ill., 200, is a case in which there was an attempt made to divide Cook County into two justice court districts. The court, at the top of page 205, says:

> "This law is desired in Cook County because it confers privileges or exemptions to a part of its inhabitants that are not enjoyed in common by the people at large. The first section proposes to exempt debtors from being sued out of the district in which they may live, although both districts may be in the same county.
>
> If this provision should be upheld, then a person residing in the city could not be sued beyond its limits, nor could a person residing out of its limits be sued in the city, without reference to the convenience or residence of the witnesses. These privileges, or burthens, whichever they might prove to be, are local and special.
>
> If this provision were sustained, it would open the way to every species of special legislation on the subject of territorial jurisdiction of justices of the peace. * * *
>
> If this provision is constitutional, can anyone imagine a local or special law on this subject that could be distinguished from it and held unconstitutional? The effects of this particular provision might not be serious, but others that would certainly follow might prove highly pernicious. If, by a strained or even a liberal construction, this provision might be sustained, still it would be against the intention of the framers of the constitution. This would be the opening through which all kinds of obnoxious legislation on this subject would pass."

ANALYSIS OF THE OPINION OF THE SUPREME COURT OF ILLINOIS IN THE DAWSON SOAP COMPANY CASE, 234 ILL., 314.

The City of Chicago in the Dawson Soap Company case contended that this statute violated the "Equal Protection of the Laws" guaranteed in the Federal Constitution. The Supreme Court did not pass upon this question but ignored it and the point was again raised in the case now presented to Your Honors.

The opinion of the Supreme Court in the Dawson Soap Company case improperly states the position of the City of Chicago. The sixth paragraph of the opinion is as follows:

> "It is, however, urged that there is no substantial difference between a *county*, city, village or a town, * * *."

Our position was and is that there is no substantial difference between cities, villages and towns. There is a very important difference as between counties and those municipal corporations known as cities, villages and towns. Cities, villages and towns are voluntary organizations while counties are *quasi* municipal organizations involuntarily organized.

> Dillon on Municipal Corporations, Chap. 2, Sec. 23, page 42.

We agree with the Supreme Court of Illinois "that there is such rational difference between a *county* and cities, villages or towns that had the liability fixed by the statute been placed upon several counties of the state and the cities, villages and towns of the state been relieved from such liability

there could have been no reasonable contention made but that the classification as a basis of legislation would have been a valid one."

See decision as rendered.

And had the law been made applicable to "counties" *only* as in Pennsylvania we would not be in a position to complain.

We disagree with the court in the Dawson opinion where they say they are "of the opinion that there is such a difference between a city, village and a town as to form a rational basis as a classification upon which to base legislation. We contend that the court is wrong both on principle and authority when it tries to find a difference between cities, villages and towns organized under the general law. Counsel for the defendant in error was unable to find any such difference, we have been unable to find any, the court itself points out none, and section 63, chapter 24, Hurd's Illinois Statutes, makes them identical in power and privilege.

The court seems to be confused by referrence to a difference between the counties of the state which are organized under township organization and those which are not. We call the attention to the fact that the Constitution of the state establishes that difference and the Illinois Constitution of 1870, section 10, provides that the legislature shall have the power to provide, specifically, laws applying to counties under township organization.

The Illinois court again does not recognize the essential difference between cities organized under special charters and those organized under the gen-

eral law. This difference is fundamental. Cities organized under special charters have special powers and special privileges. In many instances they are much stronger governmental organizations than is any municipality organized under the Illinois general law for cities, etc., passed in 1872. This difference in power makes it just as logical to discriminate between cities organized under special charters and cities organized under the general law as it is logical to discriminate in Zoology between horses and cattle. Horses and cattle in one sense may be considered as of one class, *i. e.*, animals, but they differ in power and other characteristics, which makes a logical sub-classification. Cities organized under the special charter and cities organized under the general law, viewed in their broadest sense, are all cities, but viewed in respect to their power there are essential underlying differences which lead to a logical classification into cities with special powers and cities only with general powers. We submit that this difference is not merely a difference of clothing, but is fundamental and was overlooked by the court.

The very fact that the cities organized under special characters were so dissimilar in character, even from each other was one of the strongest reasons for the Illinois constitutional provision against special legislation.

People v. *Cooper*, 83 Ill., 585.

The Illinois Supreme Court refers to *Potwin* v. *Johnson*, 108 Ill., 70. That decision, in quoting on page 80 from *Guild* v. *People*, says that when the constitutional provision against special legislation was

adopted it was "intended that all future legislation in respect to such charters should be with a view of producing *ultimate uniformity.*" We submit the Dawson Soap Company decision does not tend to promote this ultimate uniformity but fixes an arbitrary division of the way so that we can now travel along a new way which leads us back to the old special arbitrary distinctions.

In the Dawson Soap Company decision the court relies on the case of *State* v. *Hudson,* 44 Ohio St., 137. The classification of Ohio cities was formerly based upon population. See *State ex rel.* v. *Hawkins,* 44 Ohio St., page 98, at page 108. Since the decision in the Hudson case the decisions in Ohio, relative to the classification of cities, show a completely changed attitude of the Supreme Court of that state upon the question, in so far that it finally rendered necessary the passage of a new municipal code for that state. We invite your Honors to carefully read the cases of *State* v. *Cowles,* 64 Ohio St., 162; *Cincinnati* v. *Trustees,* 66 Ohio St., 440; *State ex rel.* v. *Jones,* 66 Ohio St., 453, and *State ex rel.* v. *Beacom,* 66 Ohio St., 491. These decisions completely discredit the opinion of *State* v. *Hudson.*

Heretofore the Supreme Court of Illinois have held that the classification could not be arbitrary, but is valid "if such classification is based upon a rational difference of situation or condition," referring, as they have in this opinion, for that principle, to *People* v. *Knopf,* 183 Ill., 410; *L'Hote* v. *Village of Milford,* 212 Ill., 418; *Douglas* v. *People,* 225 Ill., 536; *Potwin* v. *Johnson,* 108 Ill., 70; *Rey-*

nolds v. *Town of Foster*, 89 Ill., 257, and *People* v. *Board of Supervisors*, 223 Ill., 187. But we submit there is no rational difference of situation or condition upon one side of which lie cities and on the other side of which lie towns and villages. The great majority of cities in this state are under 3,000 inhabitants and for each one of such you can find a village or town existing under similar conditions. We cannot draw any line dividing the one from the other which is not an arbitrary and, therefore, an unconstitutional line. If the court sees the line we respectfully ask to have it defined in this opinion for the future guidance of those who must advise cities as to their constitutional rights.

On December 21, 1910, in *People ex rel. Danville* v. *Fox*, 248 Ill., 402 (93 N. E. R., 302), the court held that the mere fact that a municipality has adopted the form of government provided for cities affords no reasonable basis for conferring upon it benefits and privileges withheld from villages of equal population and differing from cities only in that they have not incorporated as cities. True it is that this act had been held constitutional in a previous case where other questions were raised against it, but that does not obviate the defects in the law.

> "Acquiescence for no length of time can legalize a clear usurpation of powers where the people have plainly expressed their will, and the constitution has appointed judicial tribunals to enforce it. A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period of violation of the constitutional prohibition without the mischief which the constitution was designed to guard against appearing, or without any one being suf-

ficiently interested in the subject to raise the question, but these circumstances cannot be allowed to sanction a clear infraction of the constitution."

Cooley's Constitutional Limitations, 85 and 86.

THIS ACT CONTRAVENES THE "DUE PROCESS OF LAW" CLAUSE OF THE 14TH AMENDMENT.

Under this head our contentions can be briefly summed up as follows: A law which makes the location of the property destroyed and not the location where the riot occurred the criterion as to who should be punished is fundamentally so unjust and unreasonable as to be constitutionally void.

Further, where a law by its terms conclusively presumes against any party as to any question of fact or liability the law is unconstitutional and void as it denies to a party the substantial right of being heard as to a material element of defense.

We do not contend that it is beyond the power of the legislature to pass a law making municipalities liable in certain cases for property destroyed by mobs or riots which occurred within their jurisdiction. No such liability existed at common law, nor was there any liability in Illinois up to July, 1887. It is better to re-enact a valid law rather than subject municipalities to the unjust and arbitrary provisions of a law which is so antagonistic to the rights guaranteed under the constitution as is our present riot law passed in 1887.

Undoubtedly, the legislature intended to compel cities and counties to suppress mobs, and for that

purpose passed this law, carrying with it a penalty. To be valid the penalty should be inflicted upon the municipality which failed to suppress the mob, not upon the municipality where the property was destroyed. For instance, a riot may occur in County A without the limits of City B. The conflagration or other destructive force may be projected within City B and there destroy property. Why should City B be punished? It has no jurisdiction over the mob. Why should County A not be punished? It had power to suppress the mob and failed to exercise it. If there was no offense in City B there should be no penalty inflicted upon it.

You might just as well enact a law inflicting a penalty upon John Brown for the offense committed by his neighbor, John Smith.

A law which permits the punishment of a municipality for what it did not neglect and by the utmost vigilance could not prevent, and at the same time by its terms protects the municipality which was responsible for the neglect and which by diligence could prevent, is a law that conflicts with the guarantees of due process of law. It is also directly opposed to the right guaranteed by the 11th section of the second article of the Constitution of the State of Illinois, which guarantees that "all penalties shall be proportioned to the nature of the offense."

The statute cannot be sustained upon the ground that it is penal. It lacks an essential element of a penal statute in that in some instances it permits the penalty to be visited upon a party not guilty of do-

ing anything prohibited or of violating any duty imposed by law.

Wadsworth v. *U. P. Ry. Co.*, 18 Colo., 600, at 612.

This law, creating a liability in case of riots, can only have a basis in negligence, and the principles governing the law of negligence are, therefore, especially valuable rights to a defendant in a suit brought under this act.

To be consistent and in compliance with the fundamental principles of justice, which are the basis of our laws, and such as our constitution is intended to secure to us, a valid, just constitutional statute could only go to the extent of providing a penalty where negligence in some form existed. When the law goes so far as to arbitrarily inflict a penalty even in cases where there is an absolute lack of negligence, and where no act of commission and no omission of duty occurred, it violates the fundamental principles of justice and constitutional law.

A law so arbitrary in its terms can have no foundation or justification for its existence, because its provisions are so clearly antagonistic to the rights guaranteed our citizens under the constitution.

In every instance where this law provides for the punishment of a municipality for that which it did not neglect and could not prevent, some other municipality goes immune from punishment for that which it did neglect and could prevent.

This leads us to the inevitable conclusion that the law is one that violates the constitutional guarantee

of equal protection of the laws and the guarantee of due process of law. Under a law equally protecting every municipality that failed to suppress a mob of twelve or more persons, should, where property is destroyed, be subject to the penalty. Under this law, it is possible for some to be grossly negligent and escape the penalty. Not only that, but while they rest secure from any penalty, another innocent, vigilant community is compelled unjustly to suffer and to pay the heavy penalty for injury caused by the gross neglect of its neighbor, not because the city which must be punished was negligent or derelict in its duty, but merely because property happened to be destroyed within its limits as the result of a riot which occurred beyond its borders and was, consequently, beyond its control.

A law which makes the location of the property destroyed and not the location where the riot occurs the criterion as to who shall be punished is fundamentally so unjust and unreasonable as to be constitutionally void.

Suppose a mob assembles in Hammond, Indiana; starts a conflagration which burns over and destroys West Hammond, Illinois, property. What power rests in the Illinois authorities to suppress the mob? What justice underlies the infliction of a penalty upon the Illinois municipalities for the loss of the property?

Again, suppose an armed mob assembles in the City of St. Louis, and by dynamiting or cannonading destroys valuable property in East St. Louis. Under the terms of this statute, would not East St. Louis be liable? Yet, who would be heard to say for

one moment that the liability was one sustained by the principles of constitutional law? What authority would the authorities of East St. Louis have to invade Missouri to anticipate the mob and disperse it before it could destroy Illinois property?

This law does not seek to make the happening of the destruction of property *prima facie* evidence of the guilt of the municipality, but by its terms the question of liability is, without a hearing, *conclusively presumed* against the municipality. A law might make the happening of the destruction of property *prima facie* evidence, but when the law by its terms makes the liability conclusive and denies the right to be heard, it violates the principles expressed in the phrase "due process of law."

Zeigler v. *C. & N. A. R. R. Co.*, 58 Ala., 97.

The legislature may change the presumptions of guilt; it may to a certain extent, declare acts evidence of an unlawful intent which had before been innocent; it may declare possession of property, on account of its dangerous character, unlawful, but such laws must always have proper safeguards for the security of private rights.

Sullivan v. *City*, 61 Ill., 242.

An arbitrary act of the legislature, taking one person's property and giving it to another, is not due process of law.

Board of Education v. *Bakewell*, 122 Ill., 339.

By similar reasoning, an arbitrary act of the legislature making one municipality pay a penalty for not suppressing a mob which only another municipality

could suppress, does not conform to the requirements of due process of law.

To hold that a legislature can create artificial presumptions of guilt from facts which are not only consistent with innocence, but which are not even a constituent part of the crime when committed, is to hold that it has the power to take away from a judicial trial, or at least substantially reduce in it, the very element which makes it judicial. To hold so is to hold that the legislature has the power to bind and circumscribe the judgments of courts and juries in matters of fact, and in an important measure to pre-determine their decisions and verdicts for them.

State v. *Beswick*, 13 R. I., 211, 219.

> "The question is not what is actually being done under a statute or ordinance that determines its constitutionality, but what may be done under and by virtue of its provisions."
>
> *Minneapolis Brewing Co.* v. *McGillivray*, 104 Fed., 258, at 269.

A law is not to be tested by considering the enormity of the evil which it seeks to prevent, but it is rather to be tested by considering how it acts in all cases which may be brought under it.

People v. *Armstrong*, 73 Mich., 288, 294.

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of persons and property should

be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should *obsta principiis.* We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law."

Boyd v. *U. S.*, 116 U. S., 616-635.

Under this statute proof of the destruction of the property by the mob of more than twelve people within the city, and want of negligence on the part of the owner, is made conclusive evidence of wrong on the part of the city, and the city is not allowed to aver or prove the contrary. No matter how careful and cautious the city may be in the management of its police force; no matter whether the mob occurred outside the limits of the city; no matter whether the mob may have acted in another state, all these defenses are sacrificed. Laws which thus deprive a party of a substantial right of defense are unconstitutional and void.

Jensen v. *Ry. Co.*, 6 Utah, 253.

Zeigler v. *S. & N. A. R. R. Co.*, 58 Ala., 594.

D. & R. G. R. Co. v. *Outcalt*, 2 Colo. App., 395.

Wadsworth v. *U. P. Ry. Co.*, 18 Colo., 600.

Cateril v. *U. P. Ry. Co.*, 2 Idaho, 540.

Bielenberg v. *Montana U. Ry. Co.*, 8 Mont., 271.
Thompson v. *M. P. Ry. Co.*, 8 Mont., 279.
Schenck v. *U. P. Ry. Co.*, 5 Wyo., 430.
East Kingston v. *Tolle*, 48 N. H., 57.
Stoudenmire v. *Brown*, 48 Ala., 699.
Street v. *City of N. O.*, 32 La. Ann., 577.

The constitutionality of laws which by their terms deprive a party of the right to introduce a substantial defense, have been passed upon and such a law held void in an able opinion by Judge Breese in the case of *Ohio & Miss. Ry. Co.* v. *Lackey*, 78 Ill., 55. In this case the court passed upon the act of 1855 making Railway Companies liable for all expenses of the coroner and his inquest and the burial of all persons who died on the cars or who were killed by collision or other accident. The law was held unconstitutional and void in so far as it attempted to make such companies liable in cases where they had violated no law or where they had been guilty of no negligence. The court at page 57 says:

> "An examination of the section will show that no default, or negligence of any kind, need be established against the railroad company, but they are mulcted in heavy charges if, notwithstanding all their care and caution, a death should occur on one of their cars, no matter how caused, even if by the party's own hand. Running of trains by these corporations is lawful, and of great public benefit. It is not claimed that the liability atttaches for the violation of any law, the omission of any duty or the want of proper care and skill in running their trains. The penalty is not aimed at anything of this kind. *We say penalty, for it is in the nature*

of a penalty, and there is a constitutional inhibition against imposing penalties where no law has been violated or duty neglected."

If our legislature had intended to punish the city or county which failed to suppress a mob which occurred within its jurisdiction, language was easily available for the purpose of clearly expressing that intention. It was not necessary to express a different intention, namely, the intention to punish a city which had jurisdiction over the location where the property was situated, regardless of the location of the mob which put into operation the force which eventually destroyed the property.

To make our position more clear in this matter, we set forth below quotations from the provisions of the statutes of other states which create a liability for injuries done by mobs.

"Section 1. If in any county or incorporated town or city of this state any church * * * dwelling house * * * or any articles of personal property shall be injured or destroyed by any riotous or tumultuous assemblage of people, the full amount of damages so done shall be recoverable * * * by suit at law against the county, town or city within whose jurisdiction such riot or tumult occurred. * * *

Section 3. In no case shall indemnity be recovered when it shall be satisfactorily proved that the civil authorities * * * have used reasonable diligence and all powers * * * for the prevention or suppression of such riots or unlawful assemblages."

Maryland Public Gen. Laws, Vol. 2, Chap. 82.

"The different municipal corporations in this state shall be liable for the damages done to

property by mobs or riotous assemblages in their respective limits."

Louisiana Revised Statutes, section 2453.

"In all cases of lynching where death ensues the county where such death takes place shall * * * be liable in exemplary damages of not less than two thousand dollars to legal representatives of the person lynched."

South Carolina, Constitution of 1895, Art. 4, Sec. 6.

"Section 1. All incorporated cities and towns shall be liable for all damages that may accrue in consequence of the action of mobs within the corporate limits."

Kansas General Statutes of 1905, Chap. 32.

"Whenever in any county or state a person shall be assassinated or murdered by any outlaw, person or persons in disguise, mob * * * the widow * * * shall be entitled to recover of the county in which such murder or assassination occurred."

Alabama, Act of Dec. 28, 1868, section 1.

"The legal representatives of a person suffering death by lynching at the hands of a mob in any county in this state shall be entitled to recover of the county in which such lynching may occur, any sum not to exceed five thousand dollars damages for such unlawful killing * * *."

Bates Ohio Stat., Vol. 2, Sec. 4426-8.

OPINION OF THE ILLINOIS SUPREME COURT IN THIS CASE.

In the opinion of the Illinois Supreme Court in this case they refuse to give effect to the argument made under this head. The court says:

> "It is well settled that courts do not entertain objections to the constitutionality of a statute unless the objection is made by one whose rights have been in some way affected."

We have no quarrel with the statement of an abstract proposition of law, but when, as in this case, there is an attempt to take money of the City of Chicago and the only basis for the claim of the right to take such money is the law in question, in such case it would seem that the rights of the city are very vitally affected, and we say that the money should not be taken because the law is clearly defective.

The court says:

> "To hold that the statute in question should be so construed as to make a city or county liable for the destruction or injury of property caused by a mob or a riot outside of the limits of the city or county would be to attribute to the legislature the doing of an unreasonable and absurd thing and something which the legislature clearly could not have contemplated."

From this statement of the court it appears that the court itself clearly recognized that the language of this act provides for a thing which is unreasonable and absurd. The language is not ambiguous, but is perfectly plain.

The province of construction lies wholly within the domain of ambiguity.

Hamilton v. *Rathborne,* 175 U. S., 414.

Ottawa Gas Light & Coke Co. v. *Downey*, 127 Ill., 201.
Willford v. *Snyder*, 37 U. S., 524.
Sedgwick on Statutes, Sec. 271.

We submit that the language of this statute is in no sense ambiguous. It is, therefore, not within the province of the court to attempt by construction to give it an application which is not within the clear meaning of the statute as drawn by the legislature. By so doing the court usurps the functions of the legislature. The court refers to the fact that other states have held riot damage acts constitutional. This is true, but in every instance the acts were worded differently than the act as passed by the State of Illinois. I will call the attention of the court to a few of these decisions in other courts.

We will hereafter refer to each of these specific cases to show that they have no application as to the point now raised and that some of them do not even discuss the constitutionality of such a law.

Pennsylvania Company v. *City of Chicago*, 81 Fed., 317.

This case simply discusses the general proposition, which we do not deny, that

> "A state may constitutionally compel its counties and cities to indemnify against loss of property arising from mobs and riots within their limits, independently of any misconduct or negligence on the part of such city or county to which the loss can be attributed."

We do insist, however, that such a liability can

only be put upon the municipality where the riot occurs, and cannot be arbitrarily put upon the city where the property was destroyed, regardless of its control over the territory where the rioters acted.

This case goes as far as any decided case in the books, but it is a long step from the point decided in this case to laying down a law that a city or county can be made liable for loss of property arising from mobs and riots which were not within their limits. In the Pennsylvania Company case the court does not discuss or consider a projected force.

Even as to the question decided in the Pennsylvania case the court seems to be in doubt as to whether liability ought to exist in the absence of negligence but ignores its own convictions and follows decisions cited. The court uses this language:

> "The question thus raised has been argued with great ability by counsel for the city *and if the question were an original one or had not been disposed of by such weight of authority, I might have come to a conclusion different from that which I now announce.*"

The court then cites *Underhill* v. *Manchester, supra; Darlington* v. *Mayor, etc., supra; Allegheny* v. *Gibson, supra,* and *State of Louisiana* v. *Mayor, etc.,* 109 U. S., 285. We will refer to each of these cases hereafter. What we now submit is simply that the Pennsylvania Company case does not decide or discuss the question that we now raise.

City of Chicago v. *Pennsylvania Company,* 119 Fed., 497.

The opinion in this case is a short opinion affirm-

ing the opinion of Judge Grosscup in 81 Fed., 317, *supra*, and relies upon the same cases. The question we raised in the Sturges case at bar was not raised or discussed by the Circuit Court of Federal Appeals.

Darlington v. *Mayor of New York*, 31 N. Y., 164.

We call the court's special attention to this case as the opinion seems to have been misunderstood by many of the courts. It decides the constitutionality of an act passed in 1855. The case concerned buildings burned in July, 1863. There were 950 plaintiffs similarly affected. (Opinion, page 173.) We ask the court to note the fact that *this case arose in* 1863 *five years before the Fourteenth Amendment* to the Federal Constitution went into effect.

The first error assigned that three-fourths of the members of the legislature did not vote on the question. That point certainly has no concern with our case. The second point was that the city was deprived of its property without due process of law. Under this heading the point only is discussed and decided that the legislature has the power to make a city or county liable for damage to property done by mobs or riots. Judge Denio, in his opinion, distinctly recognizes that our question is different from the question that he decides, for at the close of his opinion (page 205) he said:

> *"It is unnecessary to say whether the legislative jurisdiction would extend to diverting city property to other public use than such as concerns the city or its inhabitants."*

The judge reviews briefly the history of such legis-

lation and finds the basis of such laws to be in the law applicable to *"the hundred"* which made *"the hundred"* or any part thereof liable in damages to the party injured by an offense committed within the limits of *"the hundred."*

We submit, however, that one will examine the history of English law in vain if they attempt to find any case where the old English hundred was made to pay damages for an offense committed within the territorial limits of another hundred. In other words, they were not liable for the results of a force set in motion outside of their territory even though it might have resulted in damages within their territory.

The Darlington case also discusses the same point in reference to the provision that an execution should issue, but this discussion has no application at all to the matter before this court.

County of Allegheny v. *Gibson,* 90 Pa. St., 397.

The above case concerns the question as to whether the new constitution of 1874 was an amendment to the Constitution of 1838 or a substituted constitution. The constitutionality of the Riot Act was questioned on the ground that it was class legislation—that it increases the debt beyond the constitutional limits—that there was no previous tax levy —and that it violated the provision for uniform taxation. A careful analysis of this case fails to disclose any discussion of or decision of the points we raise in the Sturges case.

Luke v. *City of Brooklyn*, 43 Barb., 54.

This case is cited in the *Manhattan Cement case*. The opinion is brief and no authorities are cited. The question raised was as to the constitutionality of the New York law. It decides that the legislature has power to pass a law making municipalities liable for injury to property by mob. It does not decide nor is the question raised as to whether or not the legislature has the power to compel one municipality to pay for property destroyed by a mob or riot which existed and acted entirely within another municipality.

In re Pennsylvania Hall, 5 Pa. St., 204.

This case is also cited in the *Cement Company case* as an authority. An examination of the case, however, discloses that it only decides that the act of 1836 is not unconstitutional even though it provides that an inquest of six men was to determine the facts out of court instead of a jury of twelve to try the matter in court. This certainty does not concern the question we raise.

Underhill v. *City of Manchester*, 45 N. H., 214.

This case is cited in the opinion in the *Cement Company case*. Upon examination of it we find that it only decides that a gambling house keeper cannot recover for property destroyed in his gambling house by a riot growing directly out of a gambling transaction

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Williams v. *City of New Orleans*, 23 La. Ann., 507.

This case is cited in the *Cement Company case*, but we find that it only decides that the act of the General Assembly vesting control of the police in a Board of Metropolitan Police does not repeal or modify the Riot Act.

Chadbourn v. *Town of Newcastle*, 48 N. H., 196.

This case is also cited in the *Cement Company case*. It was brought under the Act of 1854, Chapter 1519. The court distinctly states that the question in this case is not whether the city could or ought to have prevented the destruction of the plaintiff's property, but the only question considered was whether the destruction of the property was caused by the owner's illegal or improper conduct, and the additional question as to whether he gave proper notice.

The syllabus to this case is misleading.

City of Atchison v. *Irvine*, 9 Kas., 350.

This case is cited in the *Cement Company case*. It does not decide a question of constitutionality but decides an action for killing a man should be brought in the name of his personal representatives.

Bingham v. *Bristol*, 65 Me., 426.

This case is cited in the *Cement Company case*. No constitutional question is raised. The only question raised was concerning contributory negligence and nuisance.

Clear Lake v. *Lake County*, 45 Cal., 90.

This case is cited in the *Cement Company case*. The only point it decides is that it was not necessary in California to present a claim to the Board of Supervisors before bringing an action in court.

Louisiana v. *City*, 109 U. S., 285.

This case is cited by Judge Grosscup in the Pennsylvania case, 81 Fed., 317. An examination of the case discloses that it passes upon the Louisiana statute. It was contended that the constitution prohibited a state from passing a law incurring obligation contracts. Judge Field held that the right to reimburse for damages caused by mob is not founded upon contract. He says:

> "They are invested with authority to establish a police to guard against disturbance, and it is their duty to exercise their authority so as to prevent violence from any cause and particularly from mobs and riotous assemblages. It has therefore, been generally considered as a *just burden cast upon them to make good any loss, sustained from the acts of such assmblages which* THEY *should have repressed.*"

Note from the words we put in italics that the court seems to be clearly of the opinion that the liability was based upon the ability to prevent injury. The question we raise in the Sturges case was not discussed or decided by the court. In considering this case it is important to note that the Louisiana statute provided that

> "the different municipal corporations in this state shall be liable for the damages done to pri-

vate property by *mobs or riotous assemblages in their respective limits.*"

Louisiana Revised Statute, Section 2453.

The case of *City of Iola* v. *Birnbaum*, 81 Pac. Rep., 198, was an action to recover for personal injuries. It simply holds that where the riot occurs within the corporate limits the liability of the municipality may be made absolute. Section 1 of the Kansas statute is as follows:

"All incorporated cities and towns shall be liable for all damages that may accrue in consequence of the action of *mobs within their corporate limits.*"

Kansas Statute, 1905, Chapter 32.

The *City of Madisonville* v. *Bishop*, 67 S. W., 269, was a case brought under the Kentucky statute which makes a city liable for injury to property by a mob where the city had notice of the danger and *ability to prevent it.* The case simply decides that an assemblage of a thousand people obstructing the street and discharging fireworks, thus endangering property and life, is a mob.

It is apparent, therefore, that the constitutionality of this act cannot be defended under authority of these cases to which we have just referred and which grew out of claims based upon statutes enacted to fix a liability for riots.

IN CONCLUSION.

It seems plain that there are cases in which this act will not work justly and according to the provisions of the Constitution. That being true, the question arises at once, what is the effect upon the whole law of this unconstitutional element?

It would seem clear that the law under these conditions fails to reach every member of the class that it was intended to reach. It can only be enforced against some and not against all. It, therefore, becomes class legislation, and the whole law must fall because it fails to be a general law and because the void provisions in the statute cannot be eliminated without affecting the remaining portion.

> "Laws inflicting penalties should operate equally on all citizens equally situated."
>
> *Bailey* v. *People*, 190 Ill., 28.

If the purpose of a statute is "to accomplish a certain object only, and some of its provisions are void, the whole must fall unless sufficient remains to effect the object without the aid of the invalid portion. If they are so mutually connected with and dependent on each other as conditions, consideration or compensations for each other as to warrant the belief that the legislature intended them as a whole, and if all could not be carried into effect, the legislature would not pass the residue independently, then if some parts are unconstitutional all the provisions which are thus dependent, conditional or connected must fall with them."

Cooley, Const. Limitations, pages 178, 179.

This law cannot in justice be allowed to stand as a law, because under it some municipalities which fail to suppress mobs may be punished, while other municipalities which fail to suppress mobs cannot be punished. Hence, the whole law must be held unconstitutional and void because of its violation of the constitutional provisions heretofore set forth.

Again we say, in the words of *Minn. Brew. Co.* v. *McGillivray*, 104 Fed., 258, *supra*, the question is not what is actually being done under a statute or ordinance that determines its constitutionality, but what may be done under and by virtue of its provisions.

We, therefore, ask that the statute be held unconstitutional and the judgment herein be reversed.

Respectfully submitted,

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ROBERT N. HOLT,
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APPENDIX A.

Frank Sturges, Appellee, v. *The City of Chicago, Appellant,* 237 Ill., 46.

Opinion filed December 15, 1908.

This was an action on the case commenced by Frank Sturges, the appellee, against the City of Chicago, the appellant, in the Circuit Court of Cook County, to recover damages for an injury to the property of the appellee caused by a mob or riot in the City of Chicago on the 16th day of July, 1903. A jury was waived, and the cause, by agreement of the parties, was tried by the court, and resulted in a finding and judgment in favor of the plaintiff for the sum of $702, and the city has prosecuted this appeal.

The declaration contained one count, and alleged that the plaintiff was the owner of a six-story brick building located at the corner of Green and Congress streets, in the City of Chicago; that on the 16th day of July, 1903, during a strike, a large mob or riot of more than twelve persons assembled in the vicinity of said building, and with stones, brickbats and other missiles broke and destroyed a large quantity of plate glass in the said building of the value of $1,048; that the destruction and injury to said plate glass and said building were not occasioned by the negligence or wrongful act of the plaintiff or his tenant; that the plaintiff used all diligence to protect his property from being destroyed

or injured, and averred that notice of the injury to his property was given to the city on the third day of August, 1903. The general issue was filed, and on the trial defendant submitted certain propositions in writing which challenged the constitutionality of the said statute on the ground that it was in conflict with the state and federal constitutions, and particularly in conflict with section 22 of article 4 and sections 2 and 11 of article 2 of the state constitution, and in conflict with the provisions of the fifth amendment and the first section of the fourteenth amendment to the Constitution of the United States, which propositions were all marked "refused" by the court.

The suit is based upon an act of the legislature of this state entitled "An Act to indemnify the owners of property for damages occasioned by mobs and riots," approved June 15, 1887, in force July 1, 1887, (Laws of 1887, p. 237,) and it is conceded by the appellant if said act is constitutional appellee was entitled to recover in the court below, and the judgment of that court should be affirmed.

Section 1 of the act of 1887 reads as follows: "Be it enacted by the People of the State of Illinois, represented in the General Assembly; That whenever any building or other real or personal property, except property in transit, shall be destroyed or injured in consequence of any mob or riot composed of twelve or more persons, the city, or if not in a city then the county in which such property was destroyed, shall be liable to an action by or in behalf of the party whose property was thus

destroyed or injured, for three-fourths of the damages sustained by reason thereof."

The constitutionality of this act was before this court in *City of Chicago* v. *Manhattan Cement Co.*, 178 Ill., 372, and in *Dawson Soap Co.* v. *City of Chicago*, 234 id., 314, and it was there sustained. It is, however, contended by appellant that the act should be held unconstitutional in this case upon grounds other than those upon which it is said the former decisions of this court were based and for reasons which were not then presented to the court either in the briefs filed by counsel or upon oral argument. Counsel for the appellant now contend that said act is unconstitutional for the following reasons: First, because the act makes the location of the property destroyed or injured, and not the place where the mob assembled or the riot occurred, the criterion as to who should be punished; and second, because the act makes the liability of the city or county conclusive from the fact, alone, that the property was destroyed or injured within the limits of the city or county, and wholly regardless of the fact whether the city or county, or its officers, were guilty of negligence or had the power to disperse the mob or suppress the riot.

To emphasize the first position of the appellant it is said in the brief filed by counsel on its behalf, a mob may assemble or a riot occur in one city or county, or even in a foreign state, and by the use of dynamite or cannon destroy or injure property in another city or county or in this state, and that the city or county "in which such property was destroyed or injured" may be held liable under the

statute although the city or county where the destruction or injury to the property occurred was powerless to disperse the mob or suppress the riot, as the mob or rioters were beyond the limits of the city or county. Whether a city or county in which a mob assembled or a riot occurred would be liable for property destroyed or injured in an adjoining city or county, under the circumstances suggested by counsel for appellant, need not now be discussed or decided as that sort of a case is not now before the court, and the law is well settled that courts do not entertain objections to the constitutionality of a statute unless the objection is made by one whose rights have been in some way affected. (*Neifing* v. *The Town of Pontiac*, 56 Ill., 172; *People* v. *McBride*, 234 id., 146.) The case here made by the declaration and by the proofs by the appellee brings the case clearly within the provisions of the statute,—that is, the property in question was destroyed or injured by a mob or riot in the city where the mob assembled or the riot occurred.

It is fundamental that the courts will not construe a statute so as to make it unconstitutional if any other reasonable construction can be placed upon it which will make is effectual. (*Newland* v. *Marsk*, 19 Ill., 376; *People* v. *Peacock*, 98 id., 172.) To hold that the statute in question should be so construed as to make a city or county liable for the destruction or injury of property caused by a mob or a riot outside of the limits of the city or county would be to attribute to the legislature the doing of an unreasonable and absurd thing and something which the legislature clearly could not have contemplated. This

the courts will never do, unless the language of the statute is so clear and certain in its terms that no other reasonable conclusion from the reading thereof can be reached. And even when the literal enforcement of a statute will result in inconvenience and great hardship and lead to consequences which are absurd, the courts will presume no such consequences were intended and adopt a construction which is, in its consequences, in accordance with reason and which will promote the ends of justice and avoid the absurdity. In *People* v. *Harrison*, 191 Ill., 257, the court, on page 267, said: "When the literal enforcement of a statute would result in great inconvenience and cause great injustice, and lead to consequences which are absurd and which the legislature could not have contemplated, the courts are bound to presume that such consequences were not intended, and adopt a construction which will promote the ends of justice and avoid the absurdity." To the same effect were *People* v. *City of Chicago*, 152 Ill., 546, and *Crane* v. *Chicago & Western Indiana Railroad Co.*, 233 id., 259. We think it clear, therefore, from a consideration of the statute upon which the cause of action in this case is based, said statute should be co construed as not to impose a liability upon a city or county for property destroyed or injured by a mob or riot assembling or occurring outside of the limits and beyond the control of the city or county in which the property was destroyed or injured. If the statute is given such construction, then the objection urged by the appellant against its constitutionality is removed. The Supreme Court of the State of New York, and the Supreme Courts of the

State of Pennsylvania and other states in th
Union, have each held a statute substantially in th
language of our statute constitutional. (*Darlingto*
v. *State of New York,* 31 N. Y., 163; *County of A*
legheny v. *Gibson,* 90 Pa. St., 397; 35 Amer. Rep
670.) Our conclusion, therefore, is that the fir
contention of the appellant cannot be sustained.

The second contention of the appellant is base
upon the supposition that the statute was enacte
to guard against injury to the property of the cit
zen caused by the negligence of the city or the count
in which its destruction or injury takes place,
failing to disperse a mob or suppress a riot. Th
liability imposed by statutes of this kind is not base
by the legislature or sustained by the courts upo
the theory that the city or the county in which th
property is destroyed or injured has been guilty
negligence, as the element of negligence is not th
basis upon which the liability rests, but such sta
utes are enacted by virtue of the police power of th
state and are sustained upon the ground of publ
policy, and have been universally enforced by th
courts without regard to the hardship which migh
arise by reason of their enforcement in particula
cases. The question raised in appellant's secon
contention was raised and passed upon by this cou
adversely to the contention of appellant in the ca
of *City of Chicago* v. *Manhattan Cement Co., supr*
and was there set at rest. On page 379 of the opi
ion in that case the court said: "Except that of th
State of Maryland, all of the statutes of this cha
acter, so far as we can ascertain, like our own, f
the liability of the municipality without referen

to its ability or exercise of diligence to prevent the destruction, and that feature has not been considered by any of the courts passing upon the question, as an objection to their validity." And the court in that case quoted with approval the following excerpt from the Gibson case (p. 378): "Under our political system, the state grants a portion of its sovereignty to certain municipalities. It clothes them with certain of its powers and exacts from them in return the performance of certain duties. Among the powers granted is that of maintaining a police force. Among the duties exacted is that of preserving the public peace. There is an implied contract between the state and every municipality upon which it bestows a portion of its sovereignty, that such municipality shall preserve the public peace and maintain good order within its borders. The state lends its aid when the local authorities are overborne and a call for assistance is made in the manner pointed out by law. But it is entirely within the power of the sovereign to make such communities responsible for the preservation of order. The privileges conferred must be taken with such burdens as the law-making power chooses to annex thereto." And again, on page 379: "It may seem a harsh rule to hold a community responsible for the effects of mob violence, which, apparently at least, they had no power to prevent, yet not more so than to hold every inhabitant of the English hundred liable for a robbery of which he knew nothing and had no means of arresting. *In both cases it is a police regulation.* It is based upon the theory that with proper vigilance the act might and ought to

have been prevented." And from the Darlington case, on page 378: "It cannot be doubted but that the general purposes of the law are within the scope of legislative authority. The legislature has plenary power in respect to all subjects of civil government which they are not prohibited from exercising by the constitution of the United States or by some provision or arrangement of the constitution of this state. This act proposes to subject the people of the several local divisions of the state, consisting of counties and cities, to the payment of damages to property in consequence of any riot or mob within the county or city. The policy upon which the act is framed may be supposed to be to make good at the public expense the losses of those who may be so unfortunate as, without their own fault, to be injured in their property by acts of lawless violence of a particular kind which it is the general duty of the government to prevent, and further, and principally, we may suppose, to make it the interest of every person liable to contribute to the public expense to discourage lawlessness and violence and maintain the empire of the laws established to preserve public quiet and social order. These ends are plainly within the purposes of civil government and, indeed, it is to maintain them that governments are instituted, and the means provided by this act seem to be reasonably adapted to the purposes in view."

We have gone over the questions involved in this case with much care, and have reached the same conclusion which was reached in *City of Chicago* v. *Manhattan Cement Co., supra,* where, on page 377,

this court said: "Statutes similar to ours have been in force in England as well as in several of the states of this country, for many years, and have uniformly been upheld by the courts. The constitutional right of legislatures to enact such laws under our form of government has been frequently challenged in courts of last resort, and our attention is called to no case denying that authority."

Finding no reversible error in this record the judgment of the Circuit Court will be affirmed.

Judgment affirmed.

APPENDIX B.

The Dawson Soap Company v. *The City of Chicago*
234 Ill., 314.

Opinion filed April 23, 1908. Rehearing denied June 4, 1908.

Mr. Chief Justice Hand delivered the opinion of the court:

This was an action on the case commenced by the appellee, against the appellant, in the Circuit Court of Cook County, to recover three-fourths of the value of certain personal property, of which the appellee was the owner, destroyed in consequence of a mob or riot in the City of Chicago on March 15, 1903. A jury was waived and the case was tried before the court, and resulted in a finding and judgment in favor of the plaintiff for $500, and the case has been brought to this court by appeal.

The cause of action is based upon the statute entitled "An act to indemnify the owners of property for damages occasioned by mobs and riots," approved June 15, 1887, in force July 1, 1887 (Hurd's Stat. 1905, p. 721), the first section of which reads as follows: "That whenever any building or other real or personal property, except property in transit, shall be destroyed or injured in consequence of any mob or riot composed of twelve or more persons, the city, or if not in a city then the county in which such property was destroyed, shall be liable to an action by or in behalf of the party whose property was thus destroyed or injured, for three-fourths of

the damages sustained by reason thereof." The facts are admitted, and if the act is constitutional the appellant concedes the appellee is entitled to have the judgment of the Circuit Court affirmed by this court.

The Circuit Court refused to hold certain propositions submitted upon behalf of the appellant as the law, which challenged the constitutionality of said act on the ground that it was in conflict with the first section of the fourteenth amendment to the constitution of the United States and with section 22 of article 4 of the constitution of this state.

The constitutionality of said act was before this court in the case of *City of Chicago* v. *Manhattan Cement Co.*, 178 Ill., 372, and in that case the court held the act to be constitutional. Its constitutionality was there assailed on the ground that the legislature was powerless to pass an act permitting a recovery against a county or city by a private person or corporation for an injury done to property in consequence of a mob or riot, and that a judgment recovered under said act was a debt in a constitutional sense, and that in case a city was already indebted beyond or up to the constitutional limit, the act, in so far as it permitted a judgment to be rendered against said city for damages under the provisions of said act, was unconstitutional and void. The court held against the city upon both propositions and sustained the act in so far as it was then claimed it was unconstitutional.

The contention now made by the city is, that the act is unconstitutional by reason of the fact that it gives a remedy only against a county or city in

which property is destroyed or injured in consequence of a mob or riot, and not against a village or town in which property is so destroyed or injured, and that by reason of a remedy only being given against a county or city, it is urged the act is special legislation and in conflict with the constitution of the United States and of this state. It does not follow that a law is not a general law because it does not operate equally upon every individual or municipal corporation in the state, but a law is a general one which operates alike upon all persons or municipal corporations in the state similarly situated. In *People* v. *Wright,* 70 Ill., 338, quoting from *McAunich* v. *M. and M. Railroad Co.,* 20 Iowa, 338, it was said: "Laws are general and uniform, not because they operate upon every person in the state, for they do not, but because every person who is brought within the relations and circumstances provided for is affected by the laws. They are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of those within the scope of their operation." And in *Potwin* v. *Johnson,* 108 Ill., 70, it was held that the act in relation to cities and villages was a general law and not a local and special law, although there might be municipalities in the state to which it was not applicable, such as those in existence under special charters at the time of the adoption of the constitution, which had not since sought to have their charters changed or amended. On page 80 the court said: "After full consideration and reconsideration we are as firmly committed to the doctrine as we

can be to any doctrine, that the act in relation to cities and villages is a general law, and not local or special, although there may be municipal corporations to which it is not applicable, namely, municipal corporations in existence under special charters at the time of the adoption of the constitution which have not since sought to have their charters changed or amended. It is general and of uniform application to all cities, towns and villages thereafter becoming incorporated or thereafter having their charters changed or amended, to the extent of such change or amendment, and thus fully conforms to the definition of a general law." In *Reynolds* v. *Town of Foster*, 89 Ill., 257, and in *People* v. *Board of Supervisors*, 223 id., 187, it was held that a law which applied only to counties under township organization was not a local or special law, within the meaning of the constitutional provision which inhibits special legislation, as such statute applied to and was operative in all counties in the state under township organization. And in *People* v. *Hazelwood*, 116 Ill., 319, on page 329, it was said: "We have held that laws are general and uniform, and hence not obnoxious to the objection that they are local or special, when they are general and uniform in their operation upon all in like situation." See, also, *Douglas* v. *People*, 225 Ill., 536.

It is, however, urged that there is no substantial difference between a county, a city, a village or a town, and that the statute, in fixing a liability for the destruction or injury of property in consequence of the action of a mob or riot, upon the counties or cities of the state and relieving from such liability

the villages and towns of the state is an arbitrary classification of the municipal corporations of the state for the purpose of imposing such liability, and that such classification, as a basis of legislation, makes the act unconstitutional and void. The general rule is that a classification of the municipalities of the state, such as counties, cities, villages and towns, may be made a basis for legislation if such classification is based upon a rational difference of situation or condition found in the municipalities placed in the different classes. (*People* v. *Knopf*, 183 Ill., 410; *L'Hote* v. *Village of Milford*, 212 id., 418; *Douglas* v. *People, supra; Potwin* v. *Johnson, supra; Reynolds* v. *Town of Foster, supra; People* v. *Board of Supervisors, supra.*) The statutes of this state have provided for the organization of counties, cities, villages and towns, and we are of the opinion that there is such a rational difference between a county and a city, village or town, that had the liability fixed by the statute been placed alone upon the several counties of the state and the cities, villages and towns of the state been relieved from such liability, there could have been no reasonable contention made but that the classification, as a basis of legislation, would have been a valid one. We are also of the opinion that there is such a difference between a city, a village and a town as to form a rational basis as a classification upon which to base legislation. The several acts under which the cities, villages and towns of the state are brought into existence have never been thought to be obnoxious to the constitution on the ground that there

was no rational difference of situation or condition between a city, village or town. As we have seen, this court has heretofore held that there is such a rational difference between the counties of the state which are organized under township organization and those which are not, and between the cities of the state which are organized under special charters and those which are organized under the general law, as to form a basis for valid legislation. If the difference between the counties of the state organized under township organization and those which are not, and the cities of the state which are organized under special charters and those which are not, is sufficient upon which to base a classification for legislation, clearly we think the difference between a city and a village or town is sufficient to form such basis. We think, therefore, the act in question does not conflict with the constitution of the United States or with the constitution of this state for either of the two reasons suggested by the appellant, and that the same is not special or local legislation and for that reason unconstitutional and void.

In *State* v. *Hudson*, 44 Ohio St., 137, it was held a statute providing for a police force in "cities of the first grade of the first class" applied to all cities in that grade and class in the state, and is a law of a general nature, having a uniform operation throughout the state, and is constitutional. And in *State* v. *Berlin*, 21 S. C., 295 (53 Am. Rep., 677), it was held a statute prohibiting the sale of intoxicating liquors outside of incorporated cities, towns and villages, but permitting it in those localities, was not

unconstitutional. The author of the opinion in the last case, in quoting from Judge Cooley in his work on Constitutional Limitations (2d ed., p. 390), says: "The whole matter is well summed up in a note * * * in the following words: 'To make a statute a public law of general obligation it is not necessary that it should be equally applicable to all parts of the state. All that is required is that it shall apply equally to all persons within the territorial limits described in the act.'" And in *Missouri* v. *Lewis*, 101 U. S., 22, Mr. Justice Bradley, in discussing the fourteenth amendment, said: "Each state has the right to make political subdivisions of its territory for municipal purposes and to regulate their local government. * * * Convenience, if not necessity, often requires this to be done, and it would seriously interfere with the power of a state to regulate its internal affairs to deny to it this right. * * * If every person residing or being in either portion of the state should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to, for as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances." In *City of Chicago* v. *Manhattan Cement Co., supra*, on page 377, it was said: "Statutes similar to ours have been in force in England, as well as in several of the states in this country, for many years, and have uniformly been upheld by the courts. The con-

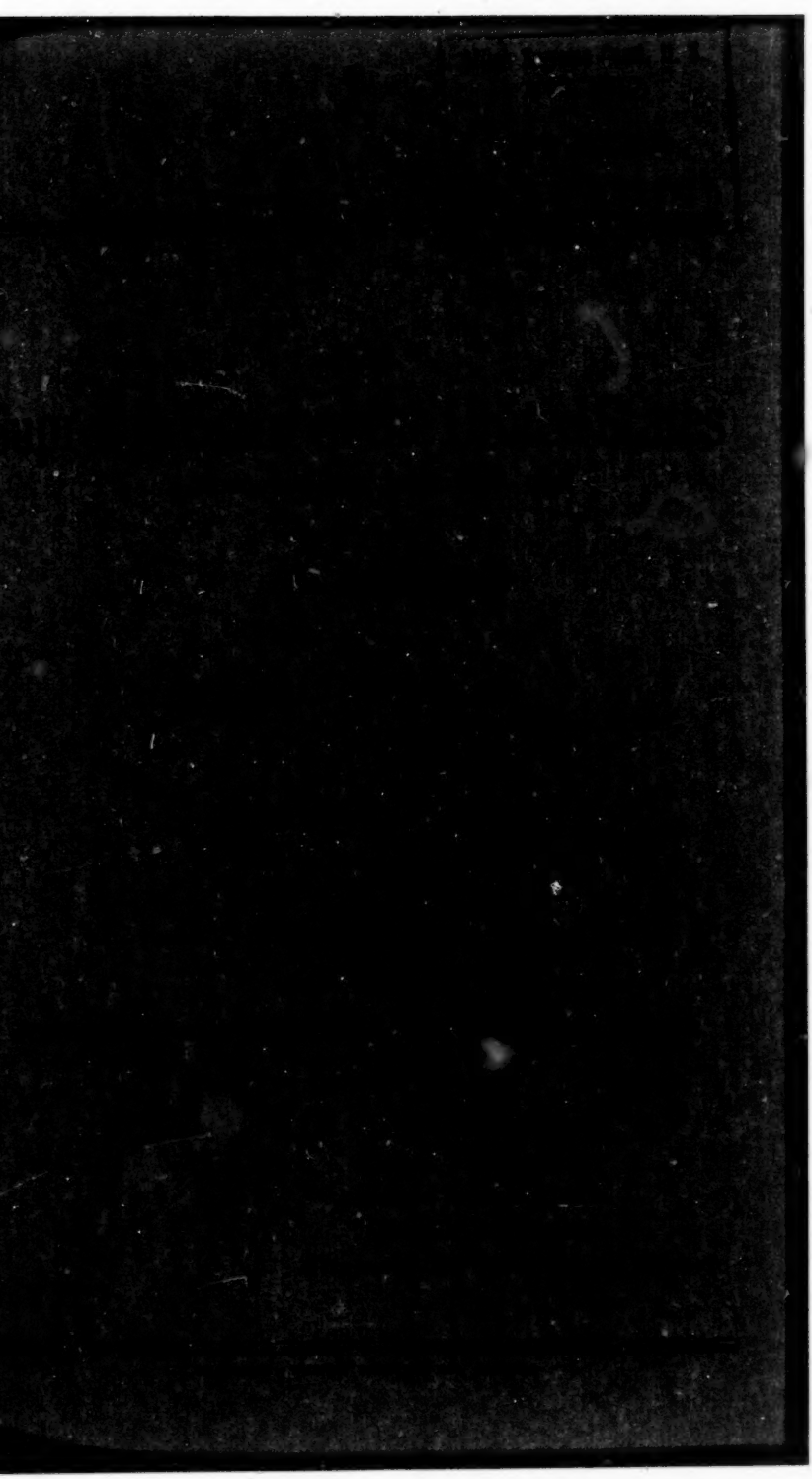
stitutional right of legislatures to enact such laws under our form of government has been frequently challenged in courts of last resort, and our attention is called to no case denying that authority."

We have given the question discussed in the briefs filed in this case careful consideration, and are of the opinion the act in question, in the particular pointed out, is constitutional.

The judgment of the Circuit will be affirmed.

Judgment affirmed.

Scott and Farmer, JJ., dissenting.



IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1910.

No. 208

THE CITY OF CHICAGO,
Plaintiff in Error,

vs.

FRANK STURGES,
Defendant in Error.

Error to Supreme Court of Illinois.

STATEMENT AND BRIEF FOR DEFENDANT IN ERROR.

This is a writ of error to the Supreme Court of Illinois, seeking to reverse the judgment of that court, affirming the judgment of the Circuit Court of Cook County.

The judgment was entered in an action on the case commenced by defendant in error against plaintiff in error in the Circuit Court of Cook County to recover damages for and injuries to the property of

defendant in error, caused by a mob or riot in the City of Chicago, on the 16th day of July, 1903; a jury was waived and the cause, by agreement of the parties, was submitted to the court and resulted in a finding and judgment in favor of defendant in error for the sum of Seven Hundred and Two Dollars ($702.00).

Defendant in error was the owner of a six-story brick building located at the corner of Green and Congress streets, in the City of Chicago. On the 16th day of July, 1903, during a strike, a large mob or riot of more than twelve persons assembled in the vicinity of said building and with stones, brickbats and other missiles, broke and destroyed a large quantity of plate glass in said building of the value of One Thousand Forty-eight Dollars ($1,048.00). The destruction and injury to said plate glass was not occasioned by the negligence or wrongful act of defendant in error, but, on the contrary, defendant in error used all due diligence to protect his property from being destroyed or injured. Due notice of the injuries to said property was given to plaintiff in error on the 3rd day of August, 1903.

The suit was commenced under the provisions of an act of the Legislature of the State of Illinois, entitled, "An Act to Indemnify the Owners of Property from Damages Occasioned by Mobs or Riots," approved June 15, 1887, in force July 1, 1887, Laws of 1887, page 237, Chap. 38, Hurd's Revised Statutes of Illinois, 1909, Sections 256 A. to 256 E., inclusive, which Act is as follows, to-wit:

> "City, or if not in City, County, Liable for Three-fourths Damages). 1. Be it enacted by

the People of the State of Illinois, represented in the General Assembly, That whenever any building or other real or personal property, except property in transit, shall be destroyed or injured in consequence of any mob or riot composed of twelve or more persons, the city, or if not in a city, then the county in which such property was destroyed, shall be liable to an action by or in behalf of the party whose property was thus destroyed or injured, for three-fourths of the damages sustained by reason thereof."

"Action, How Brought—Judgment). 2. Such action may be brought in the form of an action on the case, or other appropriate action, and whenever any final judgment shall be secured against any such city or county in any such action, the same shall be paid in due course as in case of other judgments."

"When Entitled to Recover). 3. No person or incorporation shall be entitled to recover in any such action if it shall appear on the trial thereof that such destruction or injury of property was occasioned, or in any way aided, sanctioned or permitted by the carelessness, neglect or wrongful act of such person or corporation; nor shall any person or corporation be entitled to recover any damages for any destruction or injury of property as aforesaid, unless such party shall have used all reasonable diligence to prevent such damages."

"Action by Party Against Persons Engaged in Riot—Lien of City, etc.) 4. Nothing in this act shall be construed to prevent any person or corporation whose property has been injured or destroyed in consequence of any mob or riot, from having or maintaining an action or actions against any person or persons, engaged or in any manner participating in such mob or riot, for the recovery of the damages sustained thereby: Provided, that when such city or county shall have paid any part of such damage, such

city, or county, making such payment shall have a lien to the amount so paid upon any judgment or claim, against any person or persons engaged in, or in any manner participating in such mob or riot, together with the right and power to enforce and collect such judgment or claim, and when such city or county shall have been reimbursed the money so paid by it, such portion of such judgment or judgments, or claim or claims remaining unpaid shall then revert to, and become the property of the original owner thereof, and such owner shall have the right to enforce and collect the same."

"Action by City or County Against Persons Engaged in Riot.) 5. It shall be lawful for the city or county against which a judgment, or judgments, for damages shall be recovered under the provisions of this act, to bring an action, or actions against any person or persons engaged or in any manner participating in said mob or riot, for the recovery of the amount of said judgment or judgments and costs, and such action shall not abate or fail by reason of too many or too few parties defendant being named therein; the same shall to all intents and purposes be treated as an action of trespass brought by the owners of such property, except that the statute of limitations as to such action shall not begin to run against said city or county until its liability is fixed by judgment as hereinbefore provided."

The trial court found from the evidence that on and prior to the 16th day of July, 1903, the defendant in error was the owner of a building at the northwest corner of Green and Congress streets, in the City of Chicago, which was occupied by the Kellogg Switchboard Company as a tenant under a lease containing a provision that the defendant in error should replace in said building any and all plate glass con-

ained therein that might or should become broken r destroyed; that on or prior to the 16th day of July, 903, the employees of the Kellogg Switchboard Com- any went out on a strike, and that the controversy etween the employees of the Kellogg Switchboard Company and the Company had continued for some ime previous to the 16th day of July, and on the 16th lay of July, and that as a result of said strike the Kellogg Switchboard Company was endeavoring to mploy other persons in the place of the strikers, whereupon the strikers picketed said premises; that for some days previous to the 16th day of July, 1903, the building had been guarded by the police of the City of Chicago to prevent damage thereto; that on the afternoon of the 16th day of July part of said police were withdrawn from said building and a riot resulted, in which a large number of persons, more than twelve were engaged and assembled about said building, and said rioters, surrounding said building, threw brickbats, stones and other missiles at said building and broke plate glass therein to the value of Nine Hundred Thirty Dollars ($930.00); that the defendant in error did not in any way cause, aid, sanction, or permit the breaking of said glass, nor did his tenant, the Kellogg Switchboard Company; that both the defendant in error and the said Switchboard Company used all reasonable diligence to prevent such damage; that on the 3rd day of August, 1903, the defendant in error caused to be served upon the City of Chicago a notice and claim for damages, reciting that the damages amounted to Ten Hundred Forty-eight Dollars ($1048.00) and that the defendant in error claimed and demanded from the

City of Chicago three-fourths of said sum, or the sum of Seven Hundred Eightysix Dollars ($786.00). (Rec., 26; T. of R., 17.)

No evidence was introduced by plaintiff in error but an exception was taken by the City to the facts as found by the Circuit Court and written propositions of law were submitted requesting the court to hold that said act was unconstitutional and void and in conflict with the Constitution of the United States and the Constitution of the State of Illinois. These propositions of law were respectively refused and judgment was entered against the plaintiff in error.

By its assignments of error in the Supreme Court of Illinois plaintiff in error questioned the constitutionality of said Act.

By its assignments of error in this court plaintiff in error assails the constitutionality of said Act as abridging the privileges and immunities guaranteed by Section 1 of the Fourteenth Amendment of the Federal Constitution, alleging that said Act violates the provisions guaranteeing the equal protection of the laws, and guaranteeing due process of law. (Rec., 43; T. of R., 29.)

BRIEF.

I.

a.

It is a rule of construction that a penal statute is to be strictly construed, but courts do not construe such statutes so strictly as to defeat the apparent purpose of the legislature in the enactment of the law.

United States v. *Wiltberger*, 5 Wheat., 76, 95.

Black on Interpretation of Law, Hornbook Series, 288.

United States v. *Winn*, 3 Sumn., 209 Fed. Cas. No. 16740.

Hines v. *Wilmington & W. R. Co.*, 95 N. C., 434.

People of the State of Ill. v. *Goodhart*, 248 Ill., 373.

b.

A penal statute is one which imposes punishment for a violation of statutes and which the governor of a state, or the President of the United States, is vested with power to pardon.

P., Ft. W. & C. Ry. Co. v. *Methven*, 21 Ohio St., 586.

Huntington v. *Attrill*, 146 U. S., 657.

Southerland on Statutory Construction, Sec. 358.

c.

The indemnifying statute here involved as construed by the Supreme Court of Illinois is not an act for the punishment of a city or county for a failure or an inability to control the actions of mobs and riotous assemblages.

Sturgis v. *City of Chicago,* 237 Ill., 46.

d.

When an act of the legislature can be construed and applied so as to avoid conflict with the constitution and give it the force of law, such construction will be adopted by the courts.

Colwell v. *Water Power Co.*, 4 C. E. Green, 249 (19 N. J. Eq.).
People v. *Supervisors*, 17 N. Y., 241.
Newland v. *March et al.*, 19 Ill., 384.
Cooley's Constitutional Law, 184-185.
Grenada County Supervisors v. *Brown*, 112 U. S., 261, 28 L. Ed., 704.

II.

The indemnifying act here involved is remedial and should be liberally construed.

Sturgis v. *City of Chicago,* 237 Ill., 46.
Schiellien v. *Kings County,* 43 Barb., 490.
Sarles v. *New York,* 47 Barb., 447.
Underhill v. *Manchester,* 45 N. Y., 214.
Hermits of St. Augustine v. *Philadelphia County,* Bright, 116.

III.

a.

There is a difference between cities and villages which forms a rational basis for a valid classification for purposes of legislation.

Dawson Soap Co. v. *City of Chicago,* 234 Ill., 314.

Sturgis v. *City of Chicago,* 237 Ill., 46.

The People v. *Nellis,* 249 Ill., 12.

b.

A legislature may classify cities and enact laws applicable to such cities according to their classification but the classification must not be arbitrary.

Anderson v. *City of Trenton,* 42 N. J. L., 486.

People ex rel. City of Danville v. *Fox,* 93 N. E., 302; 247 Ill., 402.

c.

The Supreme Court of the United States is not authorized to inquire into the grounds or reasons upon which a state Supreme Court proceeds in its construction of a state statute.

Marchant v. *Penn. R. Co.,* 153 U. S., 380; 38 L. Ed., 751.

IV.

a.

A village is a small assemblage of houses for dwellings, or business, or both, in the country, whether situated upon regularly laid out streets and alleys or not.

Illinois Central R. R. Co. v. *Williams*, 27 Ill., 48.

T. W. & W. R. R. Co. v. *Spangler*, 71 Ill., 568.

b.

The Supreme Court of Illinois construes the word village as used in the act for the incorporation of cities and villages to be a village or small collection of residences which has become incorporated for the better regulation of its internal police.

Phillips v. *Town of Scales Mound*, 195 Ill., 353, 358.

c.

Cities and villages organized under special charters and having thereafter adopted the general law exercise all powers conferred upon cities and villages by the general law and in addition thereto such powers as were conferred upon them respectively by their special charters which are not inconsistent with the general law, the adoption of the general law not abrogating their special charters.

Speight v. *People*, 87 Ill., 595.

Fuller v. *Heath*, 89 Ill., 296.

Chicago Dock Co. v. *Garrity et al.*, 115 Ill., 155.

Smith v. *People*, 154 Ill., 58.

Brenan v. *People ex rel.*, 176 Ill., 620.

C. C. C. & St. L. Ry. Co. v. *Randle, County Treasurer*, 183 Ill., 364.

Trustees of Schools v. *Board of School Inspectors*, 214 Ill., 30.

The People v. *Mottinger*, 215 Ill., 256.

The People v. *Hummel*, 215 Ill., 71.

Act for the Incorporation of Cities and Villages, operative July 1, 1872, Art. 1, Sec. 6, Hurd's Rev. St. of Ill.

d.

There is an essential difference between cities and villages organized under special charters and cities and villages organized under the general law.

Brief and Argument, Plaintiff in Error, 34-35.

e.

The indemnifying act here involved is applicable to all cities within the State of Illinois whether organized and still acting under a private charter alone, or organized under a private charter and thereafter having adopted the general law and now operating under the general law and such powers as were conferred upon them by their private charters and which are not inconsistent with the general law, or are organized as a city for the first time under the general law. The act is not confined in its operation to cities originally organized under the general law.

Act to Indemnify Owners of Property from Damages Occasioned by Mobs or Riots. Hurd's Rev. Stat. of Ill., 1909, Sec. 1.

V.

a.

The word "City" as used in the indemnifying act here involved is a generic designation and includes villages.

Burke v. *Monroe County,* 77 Ill., 610.

Martin et al. v. *People ex rel.,* 87 Ill., 524.

Bruner v. *Madison County,* 111 Ill., 11.

People ex rel. v. *Village of Harvey,* 142 Ill., 573.

Phillips v. *The Town of Scales Mound,* 195 Ill., 353.

People v. *Pike,* 197 Ill., 452.

State ex rel. Rice v. *Simmons,* 35 Mo. Appeal, 374.

State ex rel. Wood v. *Goldstucker,* 40 Wis., 124.

Pell v. *Newark,* 40 N. J. L., 552.

Enfield v. *Jordan,* 119 U. S., 680; 30 L. Ed., 523.

b.

Under the name of a town or village, boroughs and cities are contained for every borough or city is a town.

Tonlyn's Law Dictionary.

A city is a town incorporated by that name.

Bouvier's Law Dictionary.

Lord Coke in speaking of the capaciousness of the term "town" says:

"And it appeareth by Littleton, that a town is a genus, and a borough is the species."

Lord Coke in 1 Inst., 116.

V I.

The said Act does not violate the provisions of Section 1 of the Fourteenth Amendment guaranteeing due process of law.

Williams v. *Eggleston,* 170 U. S., 304, 42 L. Ed., 1047.

Williams v. *Parker,* 188 U. S., 491; 47 L. Ed., 559.

Keys v. *Lowry,* 199 U. S., 233, 50 L. Ed., 167.

Delaware Railroad Tax, 18 Wall., 206; 21 L. Ed., 888.

New Orleans City Railroad Co. v. *New Orleans,* 143 U. S., 192, 36 L. Ed., 121.

Marchant v. *Penn. R. Co.,* 153 U. S., 380, 38 L. Ed., 751.

Postal Tel. Cable Co. v. *Charleston,* 153 U. S., 692, 38 L. Ed., 871.

Michigan Central R. Co. v. *Powers,* 201 U. S., 245, 50 L. Ed., 744.

VII.

Municipal corporations are instrumentalities of the state for the convenient administration of government within their limits. Their functions are for the public good. They are created, among other purposes, to manage the concerns, police and public interest of the people living within their territory, and they are subject to legal obligations and duties, and derive all their powers from the legislature, except where the constitution of the state otherwise provides. They have only such powers as the legislature confers upon them. All the rights, duties and obligations of such a corporation must be ascertained and defined by the laws of the state which created it.

Louisiana v. *New Orleans,* 109 U. S., 285; 27 L. Ed., 936.

Board of Commissioners v. *Lucas,* 37 U. S., 108, 23 L. Ed., 822.

Detroit Citizens Street R. Co. v. *Detroit Railroad,* 171 U. S., 48, 43 L. Ed., 67.

VIII.

The terms of said Act do not violate the provisions of the Fourteenth Amendment guaranteeing the equal protection of the laws.

County of Mobile v. *Kimball,* 102 U. S., 691, 26 L. Ed., 238.

Marchant v. *Penn. R. Co.,* 153 U. S., 380; 38 L. Ed., 751.

Minneapolis Railroad Co. v. *Beckwith,* 129 U. S., 26, 32 L. Ed., 585.

Missouri Pacific R. Co. v. *Humes,* 150 U. S., 512, 29 L. Ed., 463.

Missouri Pacific Railroad Co. v. *Mackey,* 127 U. S., 205, 32 L. Ed., 107.

ARGUMENT.

I.

The statute here involved is not a penal statute. It is not intended to punish counties and cities for failure to suppress mobs or riots.

Plaintiff in error says on page 5 of its brief:

> "It is admitted by the City of Chicago that if this act is constitutional that Sturges is entitled under the evidence to his judgment."

Again plaintiff in error says on page 13 of its brief:

> "We admit that it is proper for the legislature to pass general enactments uniform in their character making municipal corporations liable for a portion of the damages resulting from the destruction of property by mobs or riots.
>
> We find fault, however, with the act of the Illinois legislature in that the same is not general in character, but is based upon arbitrary discrimination, both as between municipal corporations and also as between individual citizens of counties, which render the act vicious and void."

By virtue of the first admission no question of regularity in procedure or sufficiency of evidence is raised and the destruction of defendant's property by said mob within the City of Chicago is admitted and it is not claimed that the assessment of damages is excessive.

Plaintiff in error also concedes that the legislature of the State of Illinois may under its constitution enact a law making local municipal governments lia-

ble for a part of the damages resulting from the destruction of property by or in consequence of mobs or riots. The sole complaint, as appears from the last paragraph quoted above, is that the act is not general but special. This contention is considered from two viewpoints, one of which relates to an alleged discrimination between local municipal corporations and the other to an alleged discrimination between individuals, cities and counties.

Defendant in error denies that said act of the legislature discriminates between local municipal corporations and insists that a consideration of the various sections and provisions of said act makes its purpose certain and uniform in operation and shows that it does not discriminate, either between local municipal corporations or between individual citizens of counties within the State of Illinois.

In the discussion of such alleged arbitrary discrimination, said to be apparent on the face of the act considered in connection with the laws of the State of Illinois under which municipal corporations have been or may be created, plaintiff in error alleges that said act is penal and intended to inflict punishment on the inhabitants of cities or counties for a failure to suppress mobs or riots and prevent the destruction of property.

On page 8 of its brief it says:

> "Laws inflicting penalties should operate equally on all citizens equally situated."

On pages 21 and 22 of its argument it says:

> "The statute as passed in Illinois is penal in character. From this it would appear that the idea uppermost in the mind of the legislature

was the idea of punishment for neglect in suppressing mobs and riots. Since it is a penal statute it should be construed according to strict rules of construction.

Laws which inflict penalties should act equally on all citizens equally situated."

From time to time in its argument plaintiff in error alleges, and thereafter repeats as though repetition carries additional weight, that penal statutes are to be strictly construed. As a proposition it is true penal statutes are strictly construed, but in construing penal statutes courts do not construe them so strictly as to defeat the apparent purpose of the legislature in the enactment of the law.

In *United States* v. *Wiltberger,* 5 Wheat., 76, 95, Chief Justice Marshall said:

> "The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative, not in the judicial, department. It is the legislature, not the court, which is to define a crime and ordain its punishment. It is said that notwithstanding this rule the intention of the lawmaker must govern in the construction of penal as well as other statutes. This is true. But this is not a new, independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature."

In his work upon Interpretation of Laws, Hornbook Series, page 288, Black says:

> "Although, as above stated, penal statutes are

to be construed strictly, yet they are not to be construed so strictly as to defeat the obvious intention of the legislature, nor is the rule to be so applied as to exclude from the operation of the statute cases which the words in their ordinary acceptation, or in the sense in which the legislature manifestly used them, would comprehend."

In *United States* v. *Winn*, 3 Sumn., 209, Fed. Cas. No. 16,740, Mr. Justice Story said:

"Penal statutes are not to be enlarged by implication, or extended to cases not obviously within their words and purport. But where the words are general and include various classes of persons, I know of no authority which would justify the court in restricting them to one class, or in giving them the narrowest interpretation, where the mischief to be redressed by the statute is equally applicable to all of them. And where a word is used in a statute which has various known significations, I know of no rule that requires the court to adopt one in preference to another, simply because it is more restrained, if the objects of the statute equally apply to the largest and broadest sense of the word. In short, it appears to me that the proper course in all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context and promotes in the fullest manner the apparent policy and objects of the legislature."

In *Hines* v. *Wilmington & W. R. Co.*, 95 N. C., 434, the Supreme Court of that state in discussing the construction of penal statutes among other things said:

"Such enactments, as to their words, clauses, several parts, and the whole, must be construed strictly together, but as well, and as certainly in all respects, in the light of reason. This

> rule, however, is never to be applied so strictly and unreasonably as to defeat the clear intention of the legislature. On the contrary, that intention must govern in construing penal as well as other statutes. This is a primary rule of construction, applicable in the interpretation of all statutes. The meaning of words or sentences should not be narrowed or strained so as to exclude the meaning intended; and while the purpose of the statute should not be extended by implication, it should not, on the other hand, be narrowed so as to abridge the intention that reasonably appears from its words, phraseology, and constituent parts."

The foregoing quotations support the rule that though penal statutes are to be strictly construed they are not to be so strictly construed as to defeat the manifest purpose and intention of the legislature. The manifest purpose and intention of the legislature is to be ascertained, not from the preamble or title to the enactment, nor from a consideration of a sentence or a section, but from a study of the act in its entirey. As illustrative of the foregoing the very recent case of *The People of the State of Illinois* v. *Goodhart,* 248 Ill., 373, is referred to. Section 98 of the Criminal Code of that state provides as follows:

> "Every person who shall obtain or attempt to obtain from any other person or persons any money or property by means or by use of any false or bogus checks or by any other means, instrument or device commonly called the confidence game shall be imprisoned in the penitentiary not less than one year nor more than ten years."

It will be observed that this statute applies to individuals but not to corporations. A strict con-

struction thereof will not punish the successful operation of a confidence game against a corporation. This contention was urged in the Supreme Court but was not sustained. The court looked to the intention of the law and extended its language to corporations as well as to individuals and declared that one who obtains money or property from a corporation by means of a confidence game is amenable to the law. Thus a penal law which, by its terms, applied to natural persons only, was extended by construction to artificial persons. *If the indemnifying statute which is under consideration in the case at bar is a penal statute there is no reason why "city" as used in said act may not include "village," neither of which is a natural person, each being a municipal corporation.*

But said indemnifying act is not a penal statute. If it is penal the foregoing suggestions and quotations are applicable. If it is not penal the rules of construction applicable thereto are broadened. A penal statute is one which imposes punishment for the violation of statutes and which the governor of a state, or the President of the United States, is vested with power to pardon.

In *Huntington* v. *Attrill*, 146 U. S., 657, this court said that a penal law does not include state enactments which give a private action against a wrongdoer or which authorizes a recovery of forfeiture or penalties authorized to be recovered for a failure to perform a duty and which is in the nature of civil grievances or local wrongs and which are not within the class of violations of criminal statutes.

In Sutherland on Statutory Construction it is said, Section 358, the italics being ours:

> "Among penal laws which must be strictly construed, those most obviously included are all such acts as in terms impose a fine or corporal punishment under sentence in state prosecutions, or forfeitures to the state as a punitory consequence of violating laws made for the preservation of the peace and good order of society. But these are not the only penal laws which have to be so construed. There are to be included under that denomination also all acts which impose by way of punishment any pecuniary mulct or damages *beyond compensation for the benefit of the injured party*, or recoverable by an informer, or which, for like purposes, impose any special burden or take away or impair any privilege or right."

In *P., Ft. W. & C. Ry. Co.* v. *Methven*, 21 Ohio St., 586, the court held that if a statute in the nature of a police regulation provides a remedy for a private injury resulting from a violation of the statute the courts will not regard the same as being in the nature of a penalty unless it is so declared by the statutes.

The act which plaintiff in error here contends is unconstitutional is a police regulation or an act adopted by virtue of the police powers of the state giving a remedy to individuals for private injuries and under the decision of the Ohio court does not partake of the nature of a penal action, nor does the said indemnifying act declare it to be penal.

The Supreme Court of Illinois in the case at bar (237 Ill., 46) considered the purpose and character of said statute and in construing the same said:

"The liability imposed by statutes of this kind is not based by the legislature or sustained by the courts upon the theory that the city or the county in which the property is destroyed or injured has been guilty of negligence, as the element of negligence is not the basis upon which the liability rests, but such statutes are enacted by virtue of the police power of the state and are sustained upon the ground of public policy, and have been universally enforced by the courts without regard to the hardship which might arise by reason of their enforcement in particular cases. The question raised in appellant's second contention was raised and passed upon by this court adversely to the contention of appellant in the case of *City of Chicago* v. *Manhattan Cement Co., supra* (178 Ill., 372) and was there set at rest. On page 379 of the opinion in that case the court said: 'Except that of the State of Maryland, all of the statutes of this character, so far as we can ascertain, like our own fix the liability of the municipality without reference to its ability or exercise of diligence to prevent the destruction, and that feature has not been considered by any of the courts passing upon the question, as an objection to their validity.'"

Again on page 53 the court quoted with approval from the Manhattan Cement Co. case (*supra*), an excerpt from *Darlington* v. *N. Y.*, 31 N. Y., 363, as follows:

"It cannot be doubted but that the general purposes of the law are within the scope of legislative authority. The legislature has plenary power in respect to all subjects of civil government which they are not prohibited from exercising by the constitution of the United States or by some provision or arrangement of the constitution of this state. This act proposes to subject the people of the several local divi-

> sions of the state, consisting of counties and cities, to the payment of damages to property in consequence of any riot or mob within the county or city. The policy upon which the act is framed may be supposed to be to make good at the public expense the losses of those who may be so unfortunate as, without their own fault, to be injured in their property by acts of lawless violence of a particular kind which it is the general duty of the government to prevent, and further, and principally, we may suppose, to make it the interest of every person liable to contribute to the public expense to discourage lawlessness and violence and maintain the empire of the laws established to preserve public quiet and social order."

Thus the legislative intent is construed not to be to punish either city or county for a failure or an inability to control the actions of mobs and riotous assemblages, but under the police power of the state to provide a partial contribution to the loss sustained by the unfortunate whose property has been destroyed, without his fault, it being denied by the court that such contribution is based upon the negligence of either the city or county in which the property was injured or destroyed. The statute herein involved is not a penal statute. It does not possess the characteristics of a penal statute as defined by the courts.

The statute not being penal the rules of construction which courts apply to general statutes must be applied here. Under such rules this statute is presumed to be constitutional until the contrary is shown. Doubts will not weigh against its validity. Again it is generally declared by the courts that

where the language of the act, or words contained therein, are reasonably susceptible of different constructions the court will adopt the construction which reconciles the statute to the constitution and the consequences of unconstitutionality thereby be avoided.

In *Newland* v. *Marsh et al.*, 19 Ill., 384, the Supreme Court of Illinois said:

> "Whenever an act of the legislature can be so construed and applied as to avoid conflict with the constitution and give to it the force of law such construction will be adopted by the courts."

In *Grenada County Supervisors* v. *Brown*, 112 U. S., 261; 28 L. Ed., 704, this court on the authority of Cooley's Constitutional Law, 184-5, *Newland* v. *Marsh*, 19 Ill., 384; *People* v. *Supervisors*, 17 N. Y., 241 and *Colwell* v. *Water Power Co.*, 4 C. E. Green, 249 (19 N. J. Eq.), said with reference to the construction of the statute:

> "It certainly cannot be said that a different construction is required by the obvious import of the words of the statute. But if there were room for two constructions, both equally obvious and reasonable, the court must, in deference to the legislature of the state, assume that it did not overlook the provisions of the constitution and designed the Act of 1871 to take effect. Our duty, therefore, is to adopt that construction which, without doing violence to the fair meaning of the words used, brings the statute into harmony with the provisions of the constitution."

II.

It has been held in other jurisdictions that statutes similar to the statute here involved should be liberally construed and such statutes in such jurisdictions have been held to be remedial and not penal.

Plaintiff in error refers to similar statutes in other states and says (page 13):

> "Some make the town liable as in New Hampshir Section 16 of the New Hampshire Act provides that if persons riotously assemble and injure property the town within the limits of which the property is situated shall be liable for damages. Public Statutes, 1854, of New Hampshire, page 154, Sections 13 and 14.
>
> A similar provision making the town liable is set forth in the revised statutes of Maine, Section 15, page 901.
>
> The New York statute provides that the city or county shall be liable but does not limit the property owner in a city to his action against the city."

It is, therefore, conceded that the laws of other jurisdictions are similar to ours excepting as to the person or persons on whom the law operates. Concerning the New York law it was held in New York that the New York statute should receive a reasonable and liberal construction.

Schiellien v. *Kings County,* 43 Barb., 490.

The words "destroyed or injured" used in the New York statute, pursuant to the rule of a reasonable and liberal construction, was held to include property appropriated by the mob and carried away as well as property which was destroyed or injured.

Sarles v. *New York,* 47 Barb., 447.

In construing a statute similar to ours in New Hampshire the Supreme Court of that state held that inasmuch as riots are the mischief to be remedied, the statute should be construed so as to suppress the mischief.

Underhill v. *Manchester*, 45 N. H., 214.

In Pennsylvania in construing a statute similar to the Illinois statute it was held that the plaintiff need not prove every article destroyed but that a general estimate of the plaintiff's damage is sufficient, it being a matter to be considered from necessity en masse and not in detail.

Hermits of St. Augustine v. *Philadelphia County*, Bright, 116.

The foregoing decisions are based upon sound reason and are in harmony with the conclusions reached by the Supreme Court of Illinois that the statute here involved is remedial and not penal.

III.

A law which applies to all within a given class is general—not special.

There is a difference between cities and villages which is sufficient for classification for purposes of legislation.

On page 58 of its brief and argument plaintiff in error says:

> "This law cannot in justice be allowed to stand as law, because under it some municipalities which fail to suppress mobs may be punished, while other municipalities which fail to suppress mobs cannot be punished."

Here it is assumed that the object of the law is to punish a municipality for failing to suppress a mob in consequence of which failure the payment of damages is imposed. But in the construction of this statute in *Dawson Soap Co.* v. *City of Chicago*, 234 Ill., 314, the Supreme Court said this statute is not based upon the theory that the city or the county in which the property is destroyed or injured was guilty of negligence, as the element of negligence is not the basis upon which the liability rests, but that the purpose of the act was to reimburse at public expense a part of the loss sustained through lawless violence. The assumption in the foregoing paragraph is against the construction announced by the Supreme Court of Illinois which construction involves no federal question and is final.

Again it is contended by plaintiff in error that there is no substantial difference between cities, villages and towns and that the statute which permits a recovery of a part of the damage to property by destruction or injury in consequence of the action of a mob or riot from counties or cities relieves from such liability villages and towns and is therefore an arbitrary classification of municipal corporations and that such classification as a basis of legislation makes the act unconstitutional. It is conceded that such an act is constitutional if by its terms it applies to all cities, villages and towns. Its unconstitutionality is alleged to be an arbitrary classification of municipal corporations to which the act applies. But this statute does not classify municipal corporations. It adopts the classification of such corpo-

rations created and recognized by the laws of Illinois from the earliest history of the state to the present time. Cities were formerly incorporated as such under special charters. Villages were formerly incorporated as villages under special charters. Towns were formerly incorporated as towns under special charters. But the new constitution of Illinois inhibits special charters for municipal corporations. Therefore a general law for the incorporation of cities and villages was adopted and became operative on July 1st, 1872, under which all municipal corporations organized thereafter have been incorporated. This law provides for the incorporation of cities. It also provides for the incorporation of villages. Thus the laws of Illinois have from the earliest history of the state to the present time divided municipal corporations into cities and villages —cities in contemplation thereof being larger and more pretentious than villages.

When in 1887 the legislature passed the act in controversy here and made the same applicable to counties and cities it did not create a classification of municipal corporations, but by a strict construction of the language of that act, made the same applicable to one class of municipal corporations, as theretofore classified by the laws of the State of Illinois. Such classification under said various laws cannot be questioned here. The contention here made against the constitutionality of the indemnifying act of 1887 was urged and disposed of in *Dawson Soap Co.* v. *The City of Chicago, supra.* As to this contention that court said:

"The general rule is that a classification of

the municipalities of a state such as counties, cities, villages and towns may be made a basis for legislation if such classification is based upon a rational difference of situation or condition found in the municipalities placed in the different classes. * * * The statutes of this state have provided for the organization of counties, cities, villages and towns and we are of the opinion that there is such a rational difference between a county and a city, village or town that had the liability fixed by the statute been placed alone upon the several counties of a state and the cities, villages and towns of a state been relieved from such liability there could have been no reasonable contention made but that the classification as a basis of legislation would have been a valid one. We are also of the opinion that there is such a difference between a city, a village and a town as to form a rational basis as a classification upon which to base legislation. The several acts under which the cities, villages and towns of the state are brought into existence have never been thought to be obnoxious to the constitution on the ground that there was no rational difference of situation or condition between a city, village or town. As we have seen, this court has theretofore held that there is such a rational difference between the counties of a state which are organized under township organizations and those which are not, and between the cities of the state which are organized under special charters and those which are organized under the general law as to form a basis for valid legislation. If the difference between the counties of a state organized under township organization and those which are not and the cities of a state which are organized under special charters and those which are not is sufficient upon which to base a classification for legislation clearly we think the difference between a city and a village or town is sufficient to form such a basis."

Thus the Supreme Court of Illinois holds that there is a difference between cities and villages which forms a basis for a valid classification and for legislation based thereon.

The determination of whether or not such a difference exists does not involve a consideration of the indemnifying act of 1887 but does involve the general laws under which cities and villages are now incorporated and the statutes under which cities and villages were theretofore incorporated, and under which many cities and villages are still operating and from which they derive their powers and authority.

In 1905 the legislature of Illinois passed an act entitled "An Act to Suppress Mob Violence," (Hurd's Statutes, 1909, page 802), which authorized the governor to remove any sheriff who permits a prisoner to be taken from his custody by a mob and lynched. Pursuant to this act the governor removed the sheriff of Alexander County. Thereafter the state's attorney of that county filed an information in *quo warranto* against the acting sheriff praying that he be ousted from the office of sheriff. That the existing facts authorized the governor to act under said statutes was not disputed but it was insisted that the act was unconstitutional as special legislation inasmuch as it exposed to removal the sheriff of any county while other peace officers such as coroners, constables and policemen were exempted from the operation of the law. The Supreme Court held the act constitutional. In the opinion the court said (*The People* v. *Nellis*, 249 Ill., page 23), the italics being ours:

"We cannot accede to this view. * * * The

> general rule is, that a classification will suffice as a basis for legislation if such classification is based upon a rational difference of *situation or condition* found to exist in the persons or objects upon which the classification rests. (*People* v. *Knopf*, 183 Ill., 410; *L'Hote* v. *Village of Milford*, 212 id., 418; *Douglas* v. *People*, 225 id., 536; *Potwin* v. *Johnson*, 108 id., 70; *Reynolds* v. *Town of Foster*, 89 id., 257; *People* v. *Board of Supervisors*, 223 id., 187; *Dawson Soap Co.* v. *City of Chicago*, 234 id., 314.) And it does not follow that a law is not a general law because it does not operate equally upon every individual or officer in the state, but a law is a general law which does operate alike upon all persons or officers in the state who are similarly situated. (*People* v. *Wright*, 70 Ill., 388; *Potwin* v. *Johnson, supra; People* v. *Board of Supervisors, supra; Dawson Soap Co.* v. *City of Chicago, supra.*)

Thereupon the court referred to *Dawson Soap Co.* v. *City of Chicago, supra,* as an authority in support of the constitutionality of the law then under consideration and, approving *Dawson Soap Co.* v. *City of Chicago, supra,* said (page 24):

> "In *Dawson Soap Co.* v. *City of Chicago, supra,* where many of the cases are reviewed and quoted from, it was held that the act of 1887, relating to mobs and riots, and which provides for the recovery by the owner from counties and cities of the value of property destroyed by mobs and rioters assembling therein, was not unconstitutional because there could be no recovery against villages and towns, since, it was held, there was a rational difference between a county and city and a village and town."

Thus the Supreme Court of Illinois has declared that there is a rational difference between cities and

villages which authorize their classification for purposes of legislation and continues to so declare in this very recent opinion filed by the court on the twenty-fifth day of February, 1911.

Plaintiff in error to support its contention that there is no difference between cities, villages and towns cites Starr & Curtis Illinois Statutes, Ch. 24, Art. 5. This citation is to the general law. But the general law is not a limitation upon the powers of such cities and villages as are still acting under special charters nor upon such cities and villages as have adopted the general law—their special charters not being abrogated thereby. Plaintiff in error does not therefore assist in the work of determining whether or not cities and villages are identical under the laws of Illinois but leaves the burden of such investigation upon this court. Against the contention of plaintiff in error is the decision of the Supreme Court of Illinois in the *Dawson Soap Co. case, supra,* holding that there is such a rational difference between cities and villages as to support a classification of such municipal corporation, and that the classification recognized by the law is not arbitrary but is based upon rational differences.

Whether or not there is a sufficient difference between cities and villages to justify such classification does not depend upon one statute but upon a consideration of many statutes relating to the powers and duties of municipal corporations.

This court held in *Marchant* v. *Penn. R. Co.,* 153 U. S., 380; 38 L. Ed., 751, that it is not authorized to inquire into the grounds and reasons upon which the

Supreme Court of a state proceeded in its construction of a state statute or statutes. Therefore the grounds and reasons for the decision of the Supreme Court of Illinois which declares that the difference between cities and villages is sufficient for the classification of municipal corporations as a basis of legislation cannot be reviewed here.

In *Anderson* v. *City of Trenton*, 42 N. J. L., 486, the Supreme Court held that a law which applies to all towns is neither special nor local inasmuch as it applies to all towns alike and that such a law is general. The statute which the court there considered conferred upon all cities having a population of not less than 25,000 inhabitants power to issue bonds to fund floating debts. The court said such a law was special because it did not apply to all cities and, without dividing the cities of the state into classes, was applicable only to cities with not less than 25,000 inhabitants and that if the limitation as to population had been omitted and the law had applied to all cities notwithstanding the fact that it did not apply to towns it would, nevertheless, have been general in its application and operation. In the opinion the court said:

> "DIXON, J. An act concerning cities, approved March 12th, 1880 (Pamp. L., p. 258), declares that it shall be lawful for any city within this state, having a population of not less than twenty-five thousand inhabitants, and having a floating or unbonded debt, which the available funds of such city are insufficient to pay, by and through its common council or other body having control of its finances, to borrow money to the amount of such floating or unbonded indebtedness, and to issue bonds therefor.

The common council of the City of Trenton, deeming it to be among the municipalities thus designated, passed an ordinance for the issue of bonds to fund its floating debts, by virtue of these provisions, whereupon the prosecutor, a citizen and taxpayer in Trenton, sued out a writ of certiorari, to test the legality of the corporate proceedings.

The contention of the prosecutor (*inter alia*) is that this statute is special and local, and contravenes the constitutional amendment found in Paragraph 11 Section 7, Article IV, which forbids the passage of private, special, or local laws, to regulate the internal affairs of towns.

Under this clause of the constitution, it has already been decided, in this state, that a law, to be neither special nor local, need not apply to all towns—that it will be general if it apply to a class of towns. Thus, cities have been held to be included among 'towns,' as here intended (*Van Riper* v. *Parsons*, 11 Vroom, 1; *Pell* v. *Newark*, 11 Vroom, 550), and so are townships said to be (11 Vroom, 555), and, doubtless, a law embracing all cities or all townships, would be constitutional; for these bodies, because of their marked peculiarities, are, by common consent, regarded as distinct forms of municipal government, and so constituting classes by themselves. But it has further been considered that these classes, also, may be subdivided by the legislature, so that a law will be general which yet touches only a subdivision. As, however, this power of subdividing by legislation would, if unrestricted, include the power to legislate for every individual singly, since no two individuals are exactly alike, the constitutional prohibition required that some limit, excluding special and local legislation, should be placed upon its exercise. Hitherto, this limit has been declared to exist in the principle that the class to be affected must consist of individuals distinguished

by some important characteristic to which the purpose of the law relates, and must embrace all those so characterized. Thus, a statute giving to all cities bordering upon tide-water the power to construct docks or establish quarantine regulations, or providing that in all towns having volunteer fire departments, the members of the department should choose a commission to govern them, would, I presume, be valid. These groups would, according to the principle laid down, be naturally classified for legislation touching their peculiar qualities, and such legislation, though affecting them alone, would be general. But any attempt to legislate for a group of cities not classified in harmony with this principle, is, as I understand, declared to be evasive, and in violation of the fundamental law. * * *

In Pennsylvania, under a constitutional provision similar to ours, a statute has been adjudged valid which divided the cities of the state into three classes—the first, of cities containing over three hundred thousand inhabitants; the second, of these containing from one hundred thousand to three hundred thousand, and the third, of those containing from ten thousand to one hundred thousand. *Wheeler* v. *Philadelphia*, 77 Penna. St., 338; *Kilgore* v. *Magee*, 85 id., 401."

In *People ex rel. City of Danville et al.* v. *Fox, Town Collector,* 247 Ill., 402, 93 N. E., 302, it is held that a certain proviso of the road and bridge act (Hurd's Rev. Stat., 1909, Ch. 121, Sec. 16), which required all taxes levied and collected for road and bridge purposes under the provisions of sections 13 and 14 thereof within the limits of cities of 20,000 inhabitants or upwards to be paid to the city treasurer for city purposes while the first proviso of section 16 required one-half of such taxes to be

paid to the treasurer of the city for the improvement of roads, streets and bridges is violative of Article 4, Section 22, of the Constitution which prohibits the passage of local or special laws granting to any corporation, association or individuals any special or exclusive privilege or immunity inasmuch as the classification is arbitrary and discriminates against cities of less than 20,000 inhabitans. In the opinion the court, among other things, said, the italics being ours:

> "It is insisted that the proviso for the payment of all of said taxes only to cities of 20,000 population or upward is unconstitutional as class legislation and that it violates the constitutional prohibition against the passage of any local or special law granting to any corporation, association or individual any special or exclusive privilege or immunity. In our opinion the objection is well taken. We are unable to see any reasonable basis for the classification made by said proviso. The legislature may classify cities and enact laws applicable to such cities according to their classification but the classification cannot be an arbitrary one. *There must be some reason for the classification based upon differences in circumstances or conditions that will justify it.*"

Under the provisions of the act there was no apparent reason why a city of 20,000 inhabitants should enjoy such a benefit and the same benefit be denied to a city of 19,000 population. There being no reason apparent to justify such a classification as that statute made it was declared unconstitutional. The Supreme Court of Illinois recognizes the power of the legislature to classify cities and make laws which shall apply to each of said classes where

there is a reason for the classification. In such cases the act may apply to one class and not to the other. Nevertheless, being general as to that class the law is not special within the meaning of the constitution.

The indemnifying act of which plaintiff in error here complains is not subject to the objection that it distinguishes between cities and counties for it applies equally to all cities and counties. It is not, therefore, subject to the criticism that it is not general in its application to cities or counties. Other authorities might be cited to show that a legislative enactment which applies by its terms to all within a specified class is a general act and not a special act but this very recent opinion of the Supreme Court of Illinois recognizes the right to classify cities and make constitutional enactments applying to all cities within a given class but not applying to other cities. A power to so classify has been generally recognized.

But it is urged that the powers of cities and villages under the general law are identical. Based upon this contention it is insisted that there is no sufficient difference between cities and villages to classify them as a basis for legislation. This assumes that the only legitimate basis for such classification is a difference in the functions conferred by law upon cities and villages. Without comparing the powers vested in cities and villages respectively by the general incorporation laws of Illinois it is nevertheless insisted that in contemplation of said

Act there is a rational difference between cities and villages which is a sufficient basis for classification. Villages in contemplation of the law are small communities while cities are more pretentious municipal corporations. The courts of Illinois announced the distinction as early as the year 1861.

Illinois Central Railroad Co. v. *Williams*, 27 Ill., 48, was an action under a statute, charging the Illinois Central Railroad Co. with negligence in failing to erect a fence which it was contended, under the law, a railroad company was obligated to build. The declaration was held to be defective in not stating that the place where the accident occurred was not within a city, town or village, or at a road crossing, where under the law the Railroad Company was not required to fence and that it was necessary to aver such fact in the declaration. The Supreme Court said in its opinion "that any small assemblage of houses, for dwellings, or business, or both, in the country constitutes a village, whether they are situated upon regularly laid out streets and alleys, or not."

In 1872 the General Incorporation Act for the Incorporation of Cities and Villages was enacted and became operative on July 1st, of that year. Thereafter an action was brought by one *Spangler* v. *The T. W. & W. Ry. Co.* to recover damages for injury to stock through an alleged neglect of the Railroad Company to fence its road and make suitable cattle guards at highway crossings. It was not denied that the stock was injured at said crossing and it was not contended that there were cattle guards at the

place or that the road was fenced, but it was insisted by said Railroad Company that the said highway crossing was within the limits of a village and that the company was not bound to fence its road or construct cattle guards at that place. That was the only question involved. The opinion of the Supreme Court appears in 71 Ill., 568. Concerning the locality where the accident happened the Supreme Court said:

> "There are at this locality a station house, a warehouse, one store, a blacksmith shop, a postoffice and five or six dwelling houses.
>
> We think this place comes fully up to the requirements of a village as recognized by this court in *Illinois Central R. Co.* v. *Williams*, 27 Ill., 49. It was there said: 'Any assemblage of houses for dwellings, or business, or both, in the country, constitutes a village, whether they are situated upon regularly laid out streets and alleys or not.'"

Thereafter, in *Phillips* v. *Town of Scales Mound*, 195 Ill., 353 (A. D. 1902), the Supreme Court of Illinois construed the word village used in the General Act for the Incorporation of Cities and Villages as being a smaller collection of residences which became incorporated for the better regulation of internal affairs. The court said, page 358 (the italics being ours):

> "An incorporated town, *within the meaning of the statute regulating the organization of cities and villages, is 'a village or a small collection of residences* which has become incorporated for the better regulation of their internal affairs.'"

Thus the Supreme Court of Illinois both before and after the general law for the incorporation of

cities and villages became operative construed a village to be "a small collection of residences", thereby distinguishing between villages and cities.

Village having been so defined by the court it would seem that the reason for excusing villages from the operation of the indemnifying act here under consideration was rational and in itself a sufficient difference to authorize a classification for the purpose of legislation.

Sec. 1 of Article XI of Chapter 24 of the act for the Incorporation of Cities and Villages is as follows, the italics being ours (Hurd's Statutes, 1908):

> "Sec. 1. Any town in this state incorporated, either under any general law for the incorporation of towns and acts amendatory thereof, or under any special act for the incorporation of any town or village, or any town which may be organized out of territory which may be disconnected from any incorporated town under the provisions of an act entitled 'An act to provide for the division of incorporated towns,' may become organized as a village under this act in the manner following: Whenever any *thirty voters* in such town shall petition the corporate authorities thereof to submit the question whether such town will become organized as a village under this act, to the decision of the legal voters thereof, it shall be the duty of such corporate authorities to submit the same accordingly and to fix a time and place within such town for holding such election and to appoint the judges to hold such election, and to give notice of the time, place and purpose of such election by causing at least five notices thereof to be posted in public places in such town for at least fifteen days prior to holding such election."

Thereafter said Article XI was amended by adding thereto Sections 18, 19, 20, 21, 22 and 23.

Section 18 of said Article, as amended, is as follows:

> "Sec. 18. Any part of any village or incorporated town in this state, lying upon the border thereof, and having a population of not less than three hundred (300) inhabitants, may become organized as a village under this act in the manner following."

The provision of said act for the incorporation of cities provides as follows, the italics being ours:

> "Sec. 1, Art. 1. That any *city* now existing in this state may become incorporated under this act in the manner following: *Whenever one-eighth of the legal voters of such city voting at the last preceding municipal election* shall petition the mayor and council thereof to submit the question as to whether such city shall become incorporated under this act to a vote of the electors in such city, it shall be the duty of such mayor and council to submit such question to a vote of the electors of said city at the next ensuing municipal election of said city or at a special election to be designated by them, and to give the notice required by law."

Section 4 of said Article 1, provides for the incorporation of towns as cities and is as follows, the italics being ours:

> "Sec. 4. Any incorporated *town or village*, in this state, *having a population of not less than one thousand* (1,000) *inhabitants, may become incorporated as a city* in like manner as hereinbefore provided; but in all such cases the President and Trustees of such town or village shall, respectively, perform the same duties relative to such change of organization as is above required to be performed by the mayor and council of cities."

From a consideration of the foregoing provisions of the general law it is apparent that in legislative contemplation there is a marked distinction between villages and cities as to population, commercial importance *and financial ability.* This in itself forms a rational basis for classification of cities and villages for purposes of such legislation. It may be true, as is asserted by plaintiff in error, that certain municipal corporations organized as villages have grown and reached positions of commercial importance. But it does not follow that, because a village here and there, in population, has passed beyond what was the obvious legislative conception of a village the legislative difference between cities and villages is thereby destroyed and the legislative classification wiped out by growth alone. The indemnifying act here involved could not be constitutionally extended to certain of said villages and not to others unless by statutory amendment villages were so classified as to bring certain of said villages within the operation of said law. To apply the indemnifying law to villages would work a hardship on the citizens thereof which is a sufficient reason for applying the law to cities and not to villages and for approving the classification between cities and villages recognized by the statutes of Illinois. *The difference in financial ability* is a *"circumstance or condition"* which justifies the legislature in making the indemnifying act applicable to cities and not to villages. It does not militate against this plain truth that a few villages have outgrown the name village—they are villages nevertheless, and will continue to be villages until they

organize as cities. The policy of the legislature in dealing with villages cannot be dictated by the few villages which have become populous. The legislature must consider the hundreds of villages which are within the meaning of the word village as used in the general law and as construed by the Supreme Court in determining whether there are sufficient "differences or conditions" between cities and villages to justify the application of a law to one and not the other. The apparent difference in financial ability between cities and villages is in itself a justification for the omission of villages from the operation of the law.

IV.

The powers of cities and villages organized under the laws of the State of Illinois are not identical.

The constitutionality of the indemnifying act, here assaulted, has been upheld by the Supreme Court of Illinois in three cases. The City of Chicago has not overlooked a pretext upon which to assault the act in question. It has assaulted it from every angle and has been defeated in every assault.

In *City of Chicago* v. *Manhattan Cement Co.*, 178 Ill., 372, the assault was based on an alleged want of power in the legislature to pass an act which would permit a recovery against a city or county for an injury to property in consequence of mobs or riots inasmuch as a judgment under said act would be a debt in a constitutional sense and if the

city was indebted beyond its constitutional limit, the act in so far as it authorized the recovery of the judgment against the city for damages would be unconstitutional and void. Upon each proposition the Supreme Court of Illinois sustained the act as being constitutional.

In *Dawson Soap Co.* v. *City of Chicago*, 234 Ill., 314, it appears from the opinion that the city claimed the indemnifying act was unconstitutional because it created a remedy against a city but did not create a similar remedy against a village or town. It was contended, therefore, that the act was special legislation and in conflict with the constitutions of the United States and of the State of Illinois. The very question which is here presented was there presented and fully considered. That court declared that the law applied alike to all municipal corporations in the state similarly situated and was therefore general in its operation and that it was not essential that the law operate equally upon every individual or every municipal corporation in the state to be general.

The opinion in the *Dawson Soap Co. case* passes upon every contention urged here adversely to the City of Chicago.

Plaintiff in error reviews the *Dawson Soap Co. case*, commencing on page 33 of its brief and argument, and insists here, as it did there, that there is no difference between cities, villages and towns and therefore that the opinion of the Supreme Court of Illinois is without force and the statute is unconstitutional.

Plaintiff in error further asserting the similarity between cities, villages and towns on page 14 of its brief asserts that the only difference between such municipalities is in the methods of organization. The Supreme Court of the State of Illinois holds that there is a substantial difference between cities and villages so organized and no reason appears why the construction of the statute by that court is not justified by the law and facts. A mere assertion that such municipalities are identical is without force as against the finding of the Supreme Court that there is a rational difference between them.

The general act under which cities and villages are now incorporated in the State of Illinois provides for the incorporation of cities upon the one hand and villages upon the other. The act itself distinguishes between such municipal corporations. The distinction is not drawn by the courts but is created by the act. The general purpose is local self-government but there are certain characteristics which appertain to the one and certain other characteristics which appertain to the other.

If the Legislature of the State of Illinois was authorized to divide municipal corporations into cities and villages by laws relating to and governing municipal corporations a law which applies to cities is general and a law which applies to villages is general, in application and effect. In neither case is such a law special.

On page 34 of its brief and argument plaintiff in error says:

"We disagree with the court in the Dawson

> opinion where they say they are 'of the opinion that there is such a difference between a city, village and a town as to form a rational basis as a classification upon which to base legislation.' We contend that the court is wrong both on principle and authority when it tries to find a difference between cities, villages and towns organized under the general law."

Here it is admitted that the Supreme Court of Illinois holds that there is a sufficient difference between cities and villages to permit their classification for purposes of legislation. Moreover the classification of cities and villages is created by the act under which cities and villages are authorized to incorporate.

Plaintiff in error says (brief and argument, p. 34-35):

> "The Illinois court again does not recognize the essential difference between cities organized under special charters and those organized under the general law. This difference is fundamental. Cities organized under special charters have special powers and special privileges."

It may be assumed that cities or villages organized under special charters have powers not conferred upon either cities or villages organized under the general law, but it is not to be assumed that the powers of cities organized under special charters are always and necessarily different from the powers of cities organized under the general law or that the powers of villages organized under special charters are always and necessarily different from the powers of villages organized under the general law. The powers of villages and cities organized

under special charters may or may not be practically identical with the powers of cities and villages organized under the general law. The evident purpose of providing a general law for the incorporation of cities and villages is to make the powers of villages organized thereunder uniform and to likewise make the powers of cities organized thereunder uniform. But it is not true that powers of cities and villages organized under the general law are identical; nor is it true that the powers of cities organized under special laws are uniform; nor is it true that villages organized under the general law are possessed of all the powers enjoyed by cities organized under the general law; nor is it true that cities organized under special charters and which have adopted the general laws are uniform in powers with cities incorporated after the general law was adopted and which are organized thereunder. By way of illustration attention is directed to the fact that plaintiff in error was originally organized under a private charter. Later by vote of its citizens it adopted the general law of the state for its government. *Since the adoption of the general law it has consistently and continually claimed a right to exercise every power conferred upon it by its special charter which was not repealed by its adoption of the general law.* The right to exercise such powers as it possessed under its private charter, but which are not conferred upon municipal corporations by the general law, and which were not repealed by the adoption of the general law has been recognized

by the courts of this state and its right to exercise such extra powers confirmed.

What is true of the City of Chicago is true of every other city organized under the general law and which by vote has adopted the general law.

The Supreme Court of Illinois recognizes the special charters of cities which have adopted the general law as in force, and confirms their right to continue to exercise the powers and privileges conferred by their special charters in addition to the powers and privileges conferred by the general law where there is no inconsistency between the two. The question was directly raised in *Chicago Dock Co.* v. *Garrity, et al.*, 115 Ill., 155, one of the questions there being whether the location of railroad tracks within the City of Chicago was controlled by the provisions of the private charter of the City of Chicago as amended in 1867 or by the provision of the general incorporation law of 1872 which the City of Chicago had adopted. The court held that the provisions of the special charter of the City of Chicago as to the question then involved was inconsistent with the provisions of the general law which the City of Chicago had adopted and that said provision of its special charter was therefore superseded by the general law. In considering the consistency or inconsistency between said provisions the court said:

> "It is provided by section 6 of article 1 of the general incorporation law, that 'from the time of such organization or change of organization, the provisions of this act shall be applicable to such cities and villages, and all laws in conflict

> therewith shall no longer be applicable; but all laws or parts of laws not inconsistent with the provisions of this act shall continue in force, and applicable to any such city or village, the same as if such change of organization had not taken place,' and it therefore becomes necessary to inquire whether the ninth clause of section 1 of article 5 of the amended charter of 1867 is inconsistent with the provisions of the general law."

Here the court recognized the right of the City of Chicago to continue to exercise such of its special powers as are not inconsistent with the powers conferred upon it by the general law which it had adopted, the sole question involved and to be determined, being a question of consistency or inconsistency.

In *Cleveland, Cincinnati, Chicago & St. Louis Ry. Co.* v. *Randle, County Treasurer, etc.*, 183 Ill., 364, the Supreme Court of Illinois held that the adoption of the general law for the incorporation of cities and villages did not abrogate the provisions of the special charter there involved relating to the support and management of public schools and that the city might work under its special provisions relating to public schools and might levy a tax for building purposes without first taking a vote of the people to authorize the erection of a school building, such special provision containing no such requirement. In the opinion the court said:

> "It is well settled that the adoption of the general law did not abrogate those provisions of special charters not inconsistent with such general law relating to the support and management of public schools. (*Fuller* v. *Heath*,

89 Ill., 296; *Speight* v. *People*, 87 id., 595; *Smith* v. *People*, 154 id., 58; *Brenan* v. *People ex rel.*, 176 id., 620.)"

In *Trustees of Schools* v. *The Board of School Inspectors*, 214 Ill., page 30, the Supreme Court of Illinois said (p. 32-33):

> "The City of Peoria continued to operate under its special charter from 1869 until 1887, when by a vote of the people the general law for the incorporation of cities and villages was adopted. It is insisted on behalf of appellants that by the adoption of the general law the special charter of 1869 as to the school system ceased to govern, and the schools then passed under and became subject to the general school law of the state. With this position we cannot agree. The general statute provides that where a city or village operating under special charter adopts the City and Village Act, the provisions of the special charter are only superseded in so far as they are in conflict with the general law, and that in all other respects the provisions of the special charter continue and remain in full force and effect."

In *The People* v. *Hummel*, 215 Ill., 71, the Supreme Court of Illinois said that the adoption by a municipal corporation of the general incorporation law does not abrogate any provision of its special charter which is not inconsistent with or repugnant to the provisions of the general law, and that sections 13 and 32 of the act of 1863, revising the special charter of the City of Chicago and requiring the city treasurer to keep money received from water loan bonds and water rents in a seperate fund and prohibiting its use for any other purpose than that for which it was received, were not abrogated

by the city's adoption of the general Incorporation law of 1872 and that the said sections of the special charter remain in full force and effect. In the opinion the court said (pp. 73-74):

> "On April 10, 1872, the General Assembly adopted the general act providing for the incorporation of cities and villages throughout the state. (Rev. Stat. 1874, p. 211.) On the 23d day of April, 1875, the City of Chicago incorporated under the provisions of the general Incorporation act. Section 6 of article 1 of the said general Incorporation act of 1872 (Rev Stat. 1874, p. 212), provides, that from the time of the change of the organization of any town or city from its original organization to its organization under the general act the provisions of the general act shall be applicable to such cities and villages, and that all laws in conflict therewith shall no longer be applicable. Said section 6, however, further expressly provides as follows: 'But all laws or parts of laws, not inconsistent with the provisions of this act, shall continue in force and applicable to any such city or village, the same as if such change of organization had not taken place.' Sections 13 and 32 of the charter of 1863 remained thereafter in full force and validity unless repealed or superseded by inconsistent and repugnant provisions to be found in the general Incorporation act of 1872, as we have frequently held."

The court thereupon considered the question of consistency or inconsistency and held that said sections of the special charter were not in conflict with the general law and that said sections were in full force and effect.

In *The People* v. *Mottinger*, 215 Ill., 256, the Supreme Court of Illinois held the taxing power for school purposes conferred upon the City Council of

Joliet by its special charter was not abrogated by the general incorporation act nor by any provisions of the general school law. In the opinion the Supreme Court of Illinois said:

> "The City of Joliet in 1876, organized under the general Incorporation act of 1872, entitled 'An act to provide for the incorporation of cities and villages.' The act, however, we do not think deprives the city council of the City of Joliet of the power to levy taxes for school purposes conferred upon it by the act of 1857, as the subject of the levy of taxes for school purposes is not mentioned in that act, and section 6 of article 1 thereof provides, in express terms, that all laws or parts of laws not inconsistent with the provisions of said act shall continue in force and applicable to any such city or village the same as if such change of organization had not taken place."

It would seem to be unnecessary to cite other opinions by the Supreme Court of Illinois to the effect that powers conferred either upon villages or cities by special charters are not abrogated by the adoption of the general law of the state for the incorporation of cities and villages unless the same are inconsistent with the general law. Powers which are consistent with the general law, though additional to the powers conferred by the general law, remain in full force.

From the foregoing it follows that the powers exercised by cities organized under the general laws, or by cities organized and operating under special charters, or by cities organized under special charters and having thereafter adopted the general law, are not uniform and that there is as little uniform-

ity between villages and towns as between villages, towns and cities. This is the situation in Illinois, a situation which is not disclosed by the brief and argument of plaintiff in error which reaches a conclusion that cannot be justified. The brief and argument of plaintiff in error represents to the court that the powers of cities and villages are uniform. Such is not the fact.

It is not true that the powers which plaintiff in error enjoys are the same powers which villages incorporated under the general law of the state exercise and enjoy. Upon this consideration alone plaintiff in error fails in his contention that cities and villages and towns exercise identically the same powers and such contention is made absurd by its recognition of a fundamental difference between the powers of cities and villages organized under the general laws of the state and cities and villages organized under special charters on page 35 of its brief and argument. It would seem that plaintiff in error forgets that, though under the general law, it is exercising special powers not conferred by the general law.

Plaintiff in error in its brief and argument (pages 34 and 35) says that the essential difference between cities and villages organized under special charters and those organized under the general law is fundamental and that cities and villages organized under special charters have special powers and special privileges and are in many respects much stronger governmental organizations than any municipality

organized under the Illinois general law for cities and villages passed in 1872. Thereupon it says:

> "This difference in power makes it just as logical to discriminate between cities organized under special charters and cities organized under the general law as it is logical to discriminate in zoology between horses and cattle."

Plaintiff in error, therefore, concedes that there are often times marked differences between Illinois cities organized under special charters and Illinois cities organized under the general law of the state, so far as the powers which they may respectively exercise is concerned, and that the powers exercised by cities organized under special charters make such cities stronger governmental organizations than any municipality organized under the general law of 1872.

Plaintiff in error says that the distinction between cities organized under special charters and such as are organized under the general laws of the state is so marked that the distinction between them is plainly apparent and that the difference is as great as the difference between horses and cattle where the only point of similarity is that each is an animal, but that their difference in power and other characteristics logically put them in sub-classifications.

Accepting the foregoing as true the conclusion is applicable here and logically puts cities and villages in sub-classifications and the argument supports the constitutionality of said indemnifying act.

The Act of 1872 provides that cities, villages and towns existing by virtue of special charters from the

state may become incorporated thereunder. It also provides that communities not theretofore incorporated either as a village, town or city may incorporate thereunder. Section 6 of Article 1 of said act povides (Art. 1, Sec. 6, Hurd's Revised Statutes of Illinois, 1908, page 308), the italics being ours:

> "Sec. 6. All courts in this state shall take judicial notice of the existence of all villages and cities organized under this act, and of the change of the organization of any town or city from its original organization to its organization under this act; and from the time of such organization, or change of organization, the provisions of this act shall be applicable to such cities and villages, and all laws in confiict therewith shall no longer be applicable. *But all laws or parts of laws, not inconsistent with the provisions of this act, shall continue in force and applicable to any such city or village the same as if such change of organization had not taken place.*"

Thus the general law for the incorporation of cities and villages, so often referred to by plaintiff in error, expressly provides that the special charters of cities and villages are not repealed by the adoption of the general law, excepting insofar as the powers conferred by their special charters are inconsistent with the general law. Here the general law saves to cities and villages such special powers as they respectively possess in excess of and in addition to the powers conferred upon them by the general law insofar as such special powers are not inconsistent with the general law. Under the statute every city and village which was incorporated under a special charter, and which after the laws of 1872 became operative, adopted the general law re-

tains each special power conferred upon it by its special charter which is not inconsistent with the general law.

A large number of cities and villages which were incorporated under special charters continue to maintain their corporate organization thereunder not having adopted the provisions of the general law. The powers of such cities and villages, therefore, are not necessarily the same as the powers which cities and villages organized under the general law exercise.

From the foregoing considerations it is established that cities and villages which were organized under special charters and which thereafter adopted the general law exercise all the powers conferred upon cities and villages by the general law, and in addition thereto all the powers conferred by their respective special charters insofar as the same are not inconsistent with the general law. It is also established that communities which were not incorporated as municipal corporations prior to the adoption of the general law for the incorporation of cities and villages, but which have since incorporated either as cities or villages under the general law, enjoy the powers conferred upon them by the general law and no other powers.

There are, therefore, cities in the State of Illinois which were organized under special charters and which still continue under their special charters and which exercise the powers conferred upon them by their special charters and no other powers. There are also cities in the State of Illinois which were or-

ganized under special charters and have since adopted the general law which cities exercise all the powers conferred upon cities by the general law and in addition thereto all special powers conferred upon them by their special charters which are not inconsistent with the general law. Finally, there are cities in the State of Illinois which are organized under the general law and which exercise the powers conferred by the general law and no other powers.

It follows that plaintiff in error is not justified in its conclusions set out on page 14 of its brief and argument as follows:

> "In the State of Illinois local government is delegated to municipalities known as cities, villages and towns. These exercise identically the same powers. (Starr & Curtis Ill. Stat., 24, Art. 5.)
>
> The only difference between these municipalities is in their method of organization; cities, acting through a common council of aldermen and a mayor, where villages act through a board of trustees and a president thereof, while towns are organized under an old law and act through trustees but have the same functions as cities and villages."

The foregoing conclusions cannot be true as to towns, cities and villages which are organized under special charters and continue to act thereunder, nor can it be true as to cities, towns and villages organized under special charters and which have adopted the general law inasmuch as such cities, towns and villages, not only exercise the powers conferred upon them by the general law but continue to exercise all powers conferred upon them by their special charters as well which are consistent with the general law.

Concerning cities and villages incorporated under special charters plaintiff in error says on page 35 of its brief and argument:

> "The very fact that the cities organized under special charters were so dissimilar in character even from each other, was one of the strongest reasons for the Illinois constitutional provision against special legislation. *People* v. *Cooper*, 83 Ill., 585."

Plaintiff in error, therefore, asserts that cities and villages organized under special charters are not possessed of the same powers but that their powers essentially differ each from the other. The same admission must be made as to such cities and villages as have adopted the general law and which still retain all their special powers which are not inconsistent with the general law. It is not true, therefore, as alleged by plaintiff in error, that the powers of cities and villages in the State of Illinois are identical and that they only differ in the manner of their organization. It would appear that plaintiff in error does not agree that the indemnifying act of which it complains applies to every city in the State of Illinois, however organized, but would confine its application to cities organized for the first time under the general law of the state for the incorporation of cities and villages, enacted and approved April 10, 1872, and in force July 1, 1872, to obtain the benefit, if any, of the alleged similarity in the powers of cities and villages organized thereunder. The section of said indemnifying act concerning which it complains is as follows (Act of June 15, 1887):

> "Section 1. Be it enacted by the people of the State of Illinois represented in the General

> Assembly: that whenever any building or other real or personal property, except property in transit, shall be destroyed or injured in consequence of any mob or riot composed of twelve or more persons, the city, or if not in a city, then the county in which such property was destroyed, shall be liable to an action by or in behalf of the party whose property was thus destroyed or injured for three-fourths of the damages sustained by reason thereof."

Upon what principle of construction would plaintiff in error confine the foregoing section to cities organized under the general law and not to cities organized and acting under special charters? Or upon what rules of construction would plaintiff in error confine said section to cities first organized under the general law and not to cities organized under special charters and which subsequently adopted the general law under which law such cities may exercise not only the powers conferred upon cities by the general law but powers conferred upon them by their special charters insofar as such special powers are not inconsistent with the general law? Plaintiff in error cannot arbitrarily confine the operation of said indemnifying act to one class of cities and exclude all other cities. The act makes no distinction but applies to all cities. In its effort to make the powers of cities and villages uniform it would confine the legislative intent to cities and villages organized under the general law. This is regarded as essential to its contention that if the powers of cities and villages are the same the classification in the general law is unconstitutional. It does not follow, however, that uniformity of powers would render the classification unconstitutional. There are

other considerations which, however, are unnecessary to be considered here, in answering the argument of plaintiff in error for it is not true as contended that all cities and villages in Illinois are identical in powers. It follows that when the City of Chicago cites the general law to support its statement that cities and villages in the State of Illinois exercise identically the same powers it has grievously failed to grasp the force and effect of said law and has administered an approval antidote to the contention which it cited the general law to sustain.

Therefore, when the Supreme Court of Illinois asserted that there is a rational difference between cities, villages and towns it reached a just and a logical conclusion.

In the *Dawson Soap Co. case*, 234 Ill., 314, *supra*, the Supreme Court of Illinois disposed of the question, as follows:

> "It is, however, urged that there is no substantial difference between a county, a city, a village or a town, and that the statute, in fixing a liability for the destruction or injury or property in consequence of the action of a mob or riot, upon the counties or cities of the state and relieving from such liability the villages and towns of the state is an arbitrary classification of the municipal corporations of the state for the purpose of imposing such liability, and that such classification, as a basis of legislation, makes the act constitutional and void. The general rule is that a classification of the municipalities of the state, such as counties, cities, villages and towns, may be made a basis for legislation if such classification is based upon a rational difference of situation or condition found in the municipalities placed in the different classes.

(*People* v. *Knopf*, 183 Ill., 410; *L'Hote* v. *Village of Milford*, 212 id., 418; *Douglas* v. *People*, *supra*; *Potwin* v. *Johnson*, *supra*; *Reynolds* v. *Town of Foster supra*; *People* v. *Board of Supervisors*, *supra*.) The statutes of this state have provided for the organization of counties, cities, villages and towns, and we are of the opinion that there is such a rational difference between a county and a city, village or town, that had the liability fixed by the statute been placed alone upon the several counties of the state and the cities, villages and towns of the state been relieved from such liability, there could have been no reasonable contention made, but that the classification, as a basis of legislation, would have been a valid one. We are also of the opinion that there is such a difference between a city, a village and a town as to form a rational basis as a classification upon which to base legislation. The several acts under which the cities, villages and towns of the state are brought into existence have never been thought to be obnoxious to the constitution on the ground that there was no rational difference of situation or condition between a city, village or town. As we have seen, this court has heretofore held that there is such a rational difference between the counties of the state which are organized under township organization and those which are not, and between the cities of the state which are organized under special charters and those which are organized under the general law, as to form a basis for valid legislation. If the difference between the counties of the state organized under township organization and those which are not, and the cities of the state which are organized under special charters and those which are not, is sufficient upon which to base a classification for legislation, clearly we think the difference between a city and a village or town is sufficient to form such basis. We think, therefore, the act in question does not

conflict with the constitution of the United States or of the constitution of this state, for either of the two reasons suggested by the appellant, and that the same is not special or local legislation and for that reason unconstitutional and void."

Finally upon the general proposition that the law is unconstitutional because it does not apply to villages as well as cities the Supreme Court of Illinois in *Dawson Soap Co.* v. *City of Chicago, supra,* said (pp. 316-317):

"The contention now made by the city is, that the act is unconstitutional by reason of the fact that it gives a remedy only against a county or city in which property is destroyed or injured in consequence of a mob or riot, and not against a village or town in which property is so destroyed or injured, and that by reason of a remedy only being given against a county or city, it is urged the act is special legislation and in conflict with the constitution of the United States and of this state. It does not follow that a law is not a general law because it does not operate equally upon every individual or municipal corporation in the state, but a law is a general one which operates alike upon all persons or municipal corporations in the state similarly situated. In *People* v. *Wright,* 70 Ill., 388, quoting from *McAunich* v. *M. and M. Railroad Co.,* 20 Iowa, 338, it was said: 'Laws are general and uniform, not because they operate upon every person in the state, for they do not, but because every person who is brought within the relations and circumstances provided for is affected by the laws. They are general and uniform in their operation upon all persons in the like situation, and the fact of their being general and uniform is not affected by the number of those within the scope of their operation.' And in *Potwin* v. *Johnson,* 108 Ill., 70, it was held that the act in

relation to cities and villages was a general law and not a local and special law, although there might be municipalities in the state to which it was not applicable, such as those in existence under special charters at the time of the adoption of the constitution, which had not since sought to have their charters changed or amended. On page 80 the court said: 'After full consideration and re-consideration we are as firmly committed to the doctrine as we can be to any doctrine, that the act in relation to cities and villages is a general law, and not local or special, although there may be municipal corporations to which it is not applicable, namely, municipal corporations in existence under special charters at the time of the adoption of the constitution which have not since sought to have their charters changed or amended. It is general and of uniform application to all cities, towns and villages thereafter becoming incorporated or thereafter having their charters changed or amended, to the extent of such change or amendment, and thus fully conforms to the definition of a general law.' ''

The diversity of powers conferred upon cities by special charters, or by the general law, or by the generaly law suplemented by special charters, where not inconsistent with the general law, would justify the sub-classification of cities and the enactment of appropriate laws applicable to one class and the enactment of other appropriate laws applicable to another class, but the legislature did not see fit to so classify cities, but made the act uniform in operation against all cities.

Plaintiff in error says that the Illinois court does not "recognize the essential difference between cities organized under special charters and those organ-

ized under the general law," but that, nevertheless, the "difference is fundamental." Defendant in error admits that "cities organized under special charters have special powers and special privileges," and that "this fundamental difference in power makes it just as logical to discriminate between cities organized under special charters and cities organized under the general law as it is logical to discriminate in zoology between horses and cattle." The difference between cities acting under special charters, cities acting under the general law alone, and cities acting under the general law, and their special charters as well, insofar as they are not inconsistent, may be a sufficient basis on which to logically divide such cities into classes for the purpose of legislation. It is not, however, for the courts to classify cities for purposes of legislation. The power to classify is vested in the legislature.

In *People ex rel. City of Danville* v. *Fox*, 247 Ill., 402; 93 N. E., 302, *supra*, the Supreme Court of Illinois said (the italics being ours):

> "The legislature may classify cities and enact laws applicable to such cities according to their classification, but the classification cannot be an arbitrary one. There must be some reason for the classification based upon *differences in circumstances or conditions* that will justify it."

Here the court holds that classification is for the legislature, not the court, and that difference in *circumstances or conditions* will justify classification. Classification does not, therefore, depend alone upon similarity or dissimilarity in powers, but upon differences in circumstances or conditions.

V.

The word "City" as used in the indemnifying act here involved is a generic designation and includes villages.

Plaintiff in error alleges that the indemnifying act here under consideration is unconstitutional. In support of the contention it is said that the act authorizes a recovery from cities and counties of damages sustained through the destruction of property by mobs or riots, but does not authorize such a recovery from villages and towns under like circumstances. Villages and towns not being specified in the statute it is said that the law is not general in operation and application and is, therefore, unconstitutional and void.

In further support of this contention it insists that there is no rational difference between cities and villages upon which a classification can be based for the purpose of legislation. On page 14 of its brief and argument it says:

> "In the State of Illinois, local government is delegated to municipalities known as cities, villages and towns. These exercise the same powers. Starr & Curtiss Illinois Stat., Ch. 24, Art. V.
>
> The only difference between these municipalities is in their method of organization. Cites acting through a common council of aldermen and a mayor, where villages act through a board of trustees and a president thereof, while towns are organized under an old law and act through trustees but have the same functions as cities and villages."

If the foregoing statements are true, and they are accredited to the court by plaintiff in error, there is no difference between cities, villages and towns. It is alleged that cities and villages exercise identically the same power and that towns are organized under an old law and have the same functions as cities and villages. The power of the legislature to classify cities, villages and towns, for the purpose of legislation, is denied on the ground that cities, villages and towns exercise the same powers and no different powers and that mere differences in organization is not a sufficient difference to authorize classification. It also insists that a difference in population does not authorize such classification and that there are many villages in the State of Illinois having greater populations than many cities. It specially cites the Villages of Oak Park, DeKalb, Carbondale, Maywood and Harlem as villages with large populations and finally on page 17 of its brief and argument says:

> "If the legislature desired to make any of such municipal corporations liable for such injury then it must make all municipal corporations of the same character and exercising identically the same functions liable for such injury."

Later, on page 17, plaintiff in error says:

> "There are no essential underlying matters which differentiate cities, towns and villages."

The wisdom of the legislature in providing for the incorporation of cities and villages has never been called in question and it has been assumed throughout the history of the state that the legislature was authorized to create cities and villages and thereafter make appropriate laws applicable to either or both.

But such power is here denied and it is insisted that unless the act is, by its terms, applicable to both cities and villages it is unconstitutional.

If the State of Illinois can constitutionally provide for the incorporation of cities and villages, laws thereafter enacted which apply alone to cities or which apply alone to villages are not unconstitutional because they do not apply respectively to both cities and villages. They are respectively general in their application to all cities or to all villages. If this conclusion is not tenable and if there is no distinction between cities and villages the State of Illinois cannot constitutionally provide for the incorporation of cities and villages as different municipal corporations. Under such circumstances if the state assumes to do so and authorizes the incorporation of cities and villages it creates a distinction without a difference for cities and villages, under the argument, are the same.

The power to provide for the incorporation of cities and villages carries with it the power to enact laws to control such cities and villages respectively. If such power does not exist, but the state nevertheless assumes to enact a law applying to either cities or villages, but not to both, either the law authorizing the incorporation of cities and villages is unconstitutional, or the law enacted for the government of the one municipal government must extend to the other as well.

This necessarily follows if "cities, villages and towns" "exercise identically the same powers," and if "there are no essential underlying matters which

differentiate cities, towns and villages," and if cities, towns and villages are identical and differ only in that they are "clothed in different dress." If it be true that cities, villages and towns are identical in all their powers and functions no injustice is done either city, village or town, by extending the operation of the law, in the body of which only one of such municipal corporations is mentioned, to such other municipal corporations for a city is a village or a town and a town is a city or a village and a village is a city or town.

The courts have frequently extended laws which are by their terms applicable to towns alone to villages upon the ground that they are in effect the same and have likewise frequently declared that a law specifying such local municipal governments as a town extends to and includes the political division of a county known by the laws as a township. The word "city" as used in the act in question is sufficiently comprehensive to include every other local municipal corporation which is possessed of the same identical powers and no other or additional powers. No injustice is done by extending a law which, by the language of the statute, applies to cities only, to all municipal corporations exercising the identical powers which cities exercise and no different powers—there being no rational difference between them which justifies their classification as a basis for legislation. The basis for such classification being absent no reason exists why such laws shall not be construed as general laws and as applicable to all municipal corporations endowed with identical powers

and which differ from each other only in "the dress in which they are clothed."

In *Burke* v. *Monroe County*, 77 Ill., 610, the Supreme Court extended the word "cities" as used in an act of the legislature to towns and applied the provisions thereof to towns. The act there involved became operative on the first day of July, 1872, and was entitled "An Act to Restore Uniformity in the Taxation of Real and Personal Property for all Purposes in the Several Counties and Cities in this State." It was argued there that the word "cities" did not include towns. The suit arose on a claim presented to the County Board of Monroe County for expenses incurred in caring for a pauper who resided in the Town of Waterloo. The board refused to allow the claim on the ground that the pauper was not a county charge but was a charge on the Town of Waterloo. The case was heard in the Circuit Court without a jury and judgment was rendered against the claimant for costs. The case was appealed to the Supreme Court and there reversed. It appears from the opinion that the special act under which the Town of Waterloo was incorporated provided that said town should support and maintain its own paupers. Thereafter said act of July 1st, 1872, was adopted and became operative.

The questions presented by the record were whether or not the said act of July 1st, 1872, repealed that provision of the special act under which the Town of Waterloo was incorporated which required said town to support its own paupers and whether or not the word "city" as used in the act

included towns. The County of Monroe contended that the act which incorporated the town of Waterloo was not repealed by the act of 1872 but if the court should hold that it was so repealed then the act of 1872 was not applicable to incorporated *towns* but to *cities only* and hence was not applicable to the *Town* of Waterloo. The court said that in construing statutes courts should look to the language of the whole act and that if in any particular clause an expression is used which is less extensive than is necessary to effectuate the real purpose of the act it is the duty of the court to give effect to the larger expression. Among other things the court said (p. 614):

> "The only remaining question to be considered is, whether the word city, as used in the repealing clause of the act, was intended to and did embrace incorporated towns. We see no object the legislature could have in confining the provisions of the act to a city, to the exclusion of an incorporated town; certainly the same necessity existed, in order to carry out the object contemplated by the act, to embrace within its provisions incorporated towns as well as cities.
>
> But, aside from this, we are satisfied a reasonable and proper construction of the whole act, by the use of the word city, the intent was to include incorporated towns. * * *
>
> Independent, however, of this, we would not be going too far to hold that the word city included an incorporated town. In 1 Bouvier's Law Dic., art. 'City,' the author says, a city is a town incorporated by that name.
>
> Webster says, a city is 'a corporate town; a town or collective body of inhabitants, incorporated and governed by particular officers, as a mayor and alderman.'"

The foregoing is an authority directly in point. What is said there as to construction, aided by definitions from Bouvier and Webster, is as applicable to the facts in this case as to the case there under consideration.

In *Martin et al.* v. *People ex rel.*, 87 Ill., 524, the Supreme Court of Illinois held that the Town of Lake was, in effect, a village. The proceeding was prosecuted by the County Collector of Cook County for the collection of certain special assessments levied by the Town of Lake upon the real estate within its bounds. The Town of Lake was incorporated under a special charter in 1869. The procedure for the collection of such special assessments was that provided by Article 9 of the General Incorporation Act for Cities and Villages which Act became effective on July 1st, 1872. The trustees of the Town of Lake adopted said Article 9, and under the provisions thereof caused the special assessments in question to be made, which was adjudged to be correct by the Circuit Court of Cook County.

Section 168 of said General Incorporation Act for Cities and Villages provides as follows:

> "Any city or incorporated town or village may, if it so determines by ordinance, adopt the provisions of this article (Article 9) without adopting the whole act."

It was insisted in the Supreme Court that the Town of Lake was neither a city nor village, and that the words "incorporated town" must be construed to designate an incorporation other than that of a city or village, and that as to such corporation the provision of the act is in violation of the constitution,

inasmuch as the title of said act limits it to cities and villages and neither refers to nor includes incorporated towns. Concerning the Town of Lake and the general incorporation act and the contentions of the parties the Supreme Court said (p. 527):

"Before that charter was enacted, the Town of Lake was merely a municipal corporation under the laws relating to township organization. By this charter, the inhabitants of that town took another form of corporate existence, and became, also, in contemplation of law, what, in the Revised Statutes of 1874, is known as a village. By that charter, this municipality was organized for the better regulation of their internal police. It had its board of trustees, who are its 'corporate authorities,' who, by the charter, have authority to keep a record of their proceedings, to make by-laws and ordinances of a police and sanitary nature, to make public improvements by special assessments, to impose taxes and collect them, to restrain and prohibit gaming and fraudulent devices, to license and regulate the selling of ardent spirits, to license and regulate tavern keepers, grocers, victualers, billiard tables, ten-pin alleys and shooting galleries, to prevent noise, disorder and riots, to suppress disorderly houses, and to exercise many other powers of the same character. All the powers are of the kind usually conferred upon cities or villages, and of the character conferred upon cities or villages by the general law of 1872, of which this article 9 is a part.

Before the adoption of our present constitution, many special charters, conferring like powers, were granted by the General Assembly, and in most cases such corporations are called towns, but in some cases they are called villages; but the character and nature of these corporations, whether called, in their charters, towns or villages, were in all cases substantially the same.

> * * * We, therefore, hold that the Town of Lake was, and is, a village, in the sense in which that word is used in section 168 of the general act of 1872 relating to cities and villages; that it, therefore, is one of the municipal incorporations which, by that section, are authorized to avail themselves of the provisions of article 9 of that act as an amendment to their charters."

Here the Supreme Court holds the words town and village to be synonymous and inter-changeable and a provision of the general law of 1872 adopted for the incorporation of cities and villages, was applied to the Town of Lake, the court holding that the Town of Lake was in effect a village.

Bruner v. *Madison County*, 111 Ill., 11, holds that Section 1 of "an act to restore uniformity in the taxation of real and personal property, for all purposes, in the several counties and cities in this state" passed in 1872 in effect repealed all laws requiring cities to support and provide for paupers or to assume liabilities and perform duties required of counties by the general law.

In construing said act, the Supreme Court used the following language:

> "This enactment has been held to apply to incorporated towns as well as cities. (*Burke* v. *Monroe County*, 77 Ill., 610).)"

In *Phillips* v. *The Town of Scales Mound*, 195 Ill., 353, the Supreme Court construed section 5 of the Illinois act relating to cemeteries to apply to towns. Said section 5 is in words and figures as follows (Sec. 5, Chapter 21, Rev. Stat.):

> "That any city, village or township in this

state may establish and maintain cemeteries, within and without its corporate limits, and acquire lands therefor by condemnation or otherwise, and may lay out lots of convenient size for families; and may sell lots for family burying ground, or to individuals for burial purposes."

It was contended that said section 5 gives to cities, villages and townships authority to establish and maintain cemeteries within their respective corporate limits, and to acquire land therefor by condemnation, but that said section does not confer such power upon towns. The Town of Scales Mound was a *town*. It was not a *township*. The Supreme Court held that the word "township" as used in said act extended to and included "towns" and that towns might condemn land for cemetery purposes under said act. The court said, the italics being ours:

> "We recognize and indorse to the fullest extent the principle contended for by the appellant, that the law of eminent domain must be construed strictly, and that the authority to condemn property must be clear and not doubtful. But we are of the opinion that, here, there is shown a clear right to condemn the property described. The right to take private property against the consent of the owner is in derogation of private right and depends wholly on statutory regulation, and, hence, when this extraordinary power is used, there must be a strict compliance with all the provisions of the statute. *But 'a strict compliance with the statute does not necessarily mean a literal and exact compliance.'* Being of the opinion, that the cemetery act uses the word 'township' in the sense of the word 'town,' as above defined, we are of the opinion that the power to condemn was conferred upon the Town of Scales Mound.

> Even if the Town of Scales Mound was an incorporated town, this court has held that an incorporated town and an incorporated village mean the same thing. (*Martin* v. *People ex rel.*, 87 Ill., 524.) The Supreme Court of the United States following the doctrine laid down in *Martin* v. *People ex rel., supra*, has held that in Illinois an incorporated town and an incorporated village are one and the same thing. (*Enfield* v. *Jordan*, 119 U. S., 680.) Inasmuch, therefore, as under section 5 of the act in regard to cemeteries, a village is vested with power of acquiring land by condemnation, then, under the authorities which hold a village and an incorporated town to be the same thing, the appellee, as an incorporated town, would possess the power of condemnation conferred by the act upon villages."

In *People ex rel.* v. *Village of Harvey*, 142 Ill., 573, the court declared that the words "town" and "township" may be used interchangeably and among other things said:

> "An incorporated town within the meaning of the statute regulating the organization of cities and villages is a village or a small collection of residences which has become incorporated for the better regulation of their internal police."

In *The People* v. *Pike*, 197 Ill., page 452, the Supreme Court said:

> "It has been held a number of times that within the meaning of the law the terms 'town' and 'village' are synonymous. *Martin* v. *People ex rel.*, 87 Ill., 524; *Phillips* v. *Town of Scales Mound*, 195 id., 353; *Enfield* v. *Jordan*, 119 U. S., 680."

In *Enfield* v. *Jordan*, 119 U. S., 680; 30 L. Ed., 523, the court approved and adopted the holding of

the Supreme Court of Illinois in *Martin* v. *People*, 87 Ill., 524, *supra*, to the effect that in Illinois an incorporated town and an incorporated village are in effect the same.

State ex rel. Rice v. *Simmons*, 35 Mo. Appeal, 374, was *quo warranto* against the defendant, a justice of the peace of the City of Sarcoxie, Missouri. The information alleged that under the laws of Missouri no such office existed as Rice professed to fill. By way of answer Rice pleaded his qualifications and alleged that by an act of the Missouri legislature, approved March 23rd, 1881, an additional justice of the peace was given to towns of over one hundred inhabitants if said town contained a medical spring or if a medical spring was located within five hundred yards thereof and that on November 24, 1886, the County Court of Jasper County adjudged that the City of Sarcoxie was entitled to an additional justice of the peace and that he was duly appointed and commissioned and that he had taken the oath of office and entered upon the discharge of his duties as a justice of the peace. The case was heard by the court without a jury and the issues having been found in favor of the plaintiff a judgment of ouster was rendered against the defendant.

The Act of the Legislature, Laws 1881, page 154, is as follows:

> "Sec. 2803. Each municipal township, except as otherwise provided by law, shall be entitled to two justices of the peace, to be elected and commissioned in the manner hereinafter provided; and in case there shall be in any such

township an incorporated town or city having a population of over two thousand inhabitants, said town or city shall be entitled to one additional justice of the peace, who shall be a resident of such town or city. Provided, that in towns of one hundred inhabitants or more which may contain any medical spring or springs, the water of which may be used for its curative or supposed curative effects, or which may be situated within five hundred yards of any such spring, shall be entitled to a justice of the peace, in addition to the number which may be allowed by law to the township in which said town may be situated, who shall be commissioned by the County Court of the county in which said town may be, and shall possess the qualifications required by law for other justices of the peace, and shall take the same oath, possess the same jurisdiction and hold office for the same length of time, and be a resident of such town. Upon the taking effect of this act, the County Court of the county, containing such town, shall appoint a justice of the peace for such town."

In the opinion the court said, the italics being ours:

"The point is made that Sarcoxie is organized as a city of the fourth class, and that it is, therefore, not included within the word 'town,' as used by the statute. It is true that the statutes of this state in classifying cities, towns and villages, distinguishes them by class. Revised statutes, 1879, page 868; but, notwithstanding this, we are not of the opinion that the words of the section under consideration were used with reference to such distinction.

We find the case of *Van Riper* v. *Parsons*, 40 New J. L., 1, so fully and satisfactorily covering this point, that we transcribe the language of the court in that case. The contention in that case was that the word, 'towns,' as used in the

constitution, did not embrace cities. The court said: 'But this argument is founded on the false basis of looking only at the letter of the law, and turning away from its spirit. It is true that if the letter of the law is absolutely unambiguous and definite and were susceptible of but a single meaning, the clause would have to be read in such sense, no matter to what futility it might lead. But such is not the case; the word '*town*,' has no such fixed signification as this, for though *in its narrower sense* it denotes something *other than a city, in its broader scope it comprehends such a municipality. Mr. Tomlyn, in his law dictionary, under the title, 'Town,' says: 'Under the name of a town or village, boroughs, and, it is said cities are contained, for every borough or city is a town.'* Lord Coke, in 1 Inst., 116, showing the capaciousness of the term, has this language: 'And it appeareth by Littleton, that a town is a genus, and a borough is the species.' Bouvier's definition of the word 'city' is, 'a town incorporated by that name.' *These authorities suffice to show that the term in question is sufficiently classic to take in, when put to some of its uses, the institution denoted by the term 'city.' Nor is the force of this consideration counterrailed by the fact that some of the local governments in this state are incorporated under the designation of towns, and that others by the same means, are denominated 'cities.' Pell* v. *Newark*, Ib., 550; *Anderson* v. *City of Trenton*, 42 N. J. L., 487; *State* v. *Goldstucker*, 40 Wis., 124."

State ex rel. Wood v. *Goldstucker*, 40 Wis., 124, related, among other things, to a repeal of a provision of the city charter authorizing the election of justices of the peace in each ward of the city. Three years after the repeal of said provision commissioners were appointed by an acting justice of the peace

for a ward in the City of Fond du Lac to review th actions of certain town supervisors in refusing t lay out a highway. On certiorari it was alleged tha the said acting justice of the peace was not a justic of the peace in fact and that there was no author ity of law for electing such an officer in said city The Supreme Court held that the constitution au thorized cities to elect justices of the peace and tha the legislature having conferred such power upon cities could not prevent such cities from electing justices of the peace by repealing the statute. In the opinion the court said:

> "But it is further objected that Goldstucker was not a justice of the Town of Fond du Lac, or of any adjoining town, to whom an appeal from the determination of the supervisors might be taken under sec. 91, ch. 19, Tay. Stats. The fourth ward, in which he was chosen, adjoins the Town of Fond du Lac; but it is insisted that a justice of the peace of a city ward is not a justice of the peace of an adjoining town, within the meaning of the section just cited. But this view cannot prevail against the clear language of subd. 20, sec. 1, ch. 5, and sec. 162, ch. 19, Tay. Stats. The former section declares that the word 'town' may be construed to include a city ward or district, unless such construction would be repugnant to the provisions of any act specially relating to the same. That is, 'wherever the word "town" is used in any act, it may, if the context requires it, and that is clearly the sense in which the authors of the act intended it should be used, be so construed as to include cities or wards.' Mr. Justice Downer, in *State ex rel. Sherman* v. *The Common Council of Milwaukee*, 20 Wis., 87-90. Sec. 162 makes the provisions of Ch. 19 relating to highways applicable to cities, unless inconsistent with some

special provision relating to such cities. We are unable to say that the legislature intended to exclude a justice of an adjoining ward or city from the language of the appeal section; nor does any cogent reason occur to us for adopting a construction which would exclude the jurisdiction of such justice, if the language were of doubtful import, as it is not."

Pell v. *Newark*, 40 N. J. L., 552, among other things, involved the meaning of the word "towns" as used in Article 4, Section 7, Paragraph 11 of the Constitution of New Jersey. That part of the constitution is in the following words:

> "That the legislature shall not pass private, local or special laws regulating the internal affairs of towns and counties, appointing local officers or commissioners to regulate municipal affairs."

The act of the legislature which made a construction of said constitutional provision necessary authorized the Mayor and Common Council of the City of Newark to divide the city into wards and election districts and to appoint necessary inspectors, judges of elections, clerks of elections required by law, etc. The question involved was whether or not the word "*towns*" as used in the constitution included *cities*. Upon that question the court said (pp. 553, 554, 555):

> "As I have said, I find no difficulty in concluding that this law, considered as a whole, is in direct conflict with the constitutional provision under review, provided such provision be applicable to the City of Newark.
>
> This conclusion leads to the second point of inquiry, which is, whether the constitutional restriction in question is operative in the *cities* of the state. The language of the clause is pro-

hibitive of the enactment of 'private, local, special laws regulating the internal affairs *towns* and counties.' The question is as to t meaning of the word 'towns,' in this conn tion. When this subject was before the S preme Court, in the case of *Van Riper* v. *P sons, ante* p. 1, it was considered that this te 'towns,' in its largest signification, embrac cities, and that, in view of the obvious purpo indicated by the provision, it was to be co strued in that large sense. The maximum mischief occasioned by these special laws, h been exhibited in the cities of the state, and t minimum in the towns, using the term in its r stricted meaning, and therefore, to apply t remedy so as to embrace solely this minor cla of evils, seemed to the court, as a matter of leg construction, a mere *reductio ad absurdum.* is not necessary to repeat the course of reaso ing that led the Supreme Court to this conclusio as it appears in the case as reported. T same subject was pressed upon the attention this court, and I have, therefore, again car fully considered the grounds of my former co clusion. But my further reflections and r searches have not altered my first conviction I still think this word 'towns' cannot, rationall in this text, be taken in its ordinary and na row sense. It seems to me entirely clear th the purpose for which this clause was designe is not to be doubted or misunderstood, and th it is equally clear, that to take the term in i narrow meaning, is to defeat, almost entirel such purpose. The provision is remedial, ar the remedy is to be made, if practicable, co mensurate with the evil at which it is aime It appears to me that constitutional provisio are to be construed with much liberality in th light of their reason and purpose, the object b ing to arrive, from their language as applied t the subject to which it relates, at the intentio

of the people in establishing them. Mr. Justice Story has this just stricture upon the unwisdom of adhering too closely to the letter, in the interpretation of these important instruments. He says: 'It does not follow, either logically or grammatically, that because a word is found in one connection, in the constitution, in a definite sense, therefore the same sense is to be adopted in every connection in which it occurs. This would be to suppose that the framers weighed only the force of single words, as philologists or critics, and not whole clauses and objects, as statesmen and practical reasoners.' I think it, then, altogether safe to declare that, when a term has two meanings—the one a narrow and usual one, and the other a broader, though more unusual one, and the acceptance of the former meaning will, in part, impair the purpose clearly manifested in the clause in which the term occurs, and the acceptance of such latter meaning will fully effectuate such purpose—it is in this last sense that such term is to be interpreted. This was the principle of construction adopted in the Supreme Court in the case referred to, and I think it is the correct one, and is applicable in the present instance.

Nor can I think that the learned counsel of the relators were as happy in their struggle with this branch of the case as they were with the other topics of argument; but I cannot but think that the premises assumed by them was a fatal concession against their view of this subject. Apparently perceiving the absurdity of limiting the meaning of the term 'towns' to the designation of the few localities to which in its narrow sense it is applicable, it was contended that the terms, in a wide sense, embraced townships, as it was admitted that it did cities. Now I agree with these premises, that this word in this wide sense takes in both townships and cities, but I think that it is a palpable *non sequitur*

to deduce from such *data* the conclusion that thereby the clause becomes applicable to townships and not to cities. Counsel insisted, with much force, that townships were within the mischiefs to be remedied, and certainly there will be no denial that cities are; then if both places are within the meaning of the terms used and both within the mischiefs, why are not both subject to the remedial protection of the clause? In my opinion, such is in reality the result, the term 'towns' in the passage standing as a generic designation, embracing township as well as cities, and all other places corporate established for local government of the same grade as these and also those of an inferior order, if any such there be.

Finding this fatal infirmity in this original act, it would be altogether superfluous to inquire into the validity of any of those subsequent statutes which it was said operated to repeal the law above considered.

I think the judgment of the Supreme Court should, on the ground just stated, be affirmed."

Thus the word "city" is declared to be generic. It includes the word village and the word town, and the word city as used in the indemnifying act here involved, is a "generic designation." It follows that said act applies to villages as well as to cities. The conclusion is inevitable if the powers of cities and villages are identical, and if that fact precludes classification, inasmuch as under such circumstances cities and villages are the same.

V I.

Said Act does not violate the privileges and immunities guaranteed by Section 1 of the Fourteenth Amendment to the Federal Constitution guaranteeing the equal protection of the laws.

By its assignment of error in this court plaintiff in error alleges that the said act of the Legislature of the State of Illinois violates the privileges and immunities guaranteed by Section 1 of the Fourteenth Amendment to the Federal Constitution guaranteeing the equal protection of the laws.

With the impolicy of the law the equal protection clause of the Fourteenth Amendment has no concern. The hardship, impolicy or injustice of said law is not necessarily an objection to their constitutional validity. The Federal Supreme Court is not a harbor in which can be found a refuge from unwise, unequal and oppressive state legislation.

The case of *Marchant* v. *Pennsylvania Railroad Co.*, 153 U. S., 38, 38 L. Ed., 751, was an action brought in the Common Pleas Court of the County of Philadelphia, State of Pennsylvania, against the Railroad Company for the recovery of damages occasioned by the erection by the Railroad Company of its elevated road, on property belonging to the Railroad Company, in front of plaintiff's property. The plaintiff alleged in her declaration that by the erection and maintenance of the elevated road and the continual passage of passenger and freight cars thereon, she was injured in the possession and use

of her property and that her buildings were greatly depreciated in value. The trial resulted in a verdict and judgment for the plaintiff in the sum of Four Thousand Nine Hundred Eighty Dollars ($4,980.00). The case was taken to the Supreme Court of Pennsylvania where the judgment was reversed and the majority of the court held that the plaintiff had no legal cause of action and thereupon a writ of error was sued out of the Supreme Court of the United States.

By her specifications of error the plaintiff endeavored to reverse the judgment of the Supreme Court of Pennsylvania because she was deprived of the equal protection of the laws, and because she was deprived of her property without due process of law. The court says:

> "In reaching a conclusion that the plaintiff under the admitted facts in the case, had no legal cause of action, the Supreme Court of Pennsylvania was called upon to construe the laws and constitution of the state. * * * We are not authorized to inquire into the grounds and reasons upon which the Supreme Court of Pennsylvania proceeded in its construction of the statutes and constitution of that state."

Again the court says:

> "But we are urged to sustain and exercise our jurisdiction in this case because it is said the plaintiff's property was taken without due process of law and because plaintiff was denied the equal protection of the laws and these propositions are said to present federal questions arising under the Fourteenth Amendment to the Constitution of the United States to which our jurisdiction extends. It is sufficient for us in the present case to say that even if

the plaintiff could be regarded as having been deprived of her property the proceedings that so resulted were in due process of law."

Again the court says:

"The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. Class legislation discriminating against some and favoring others is prohibited, but legislation which in carrying out a public purpose is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated it is not within the Amendment."

The Act which plaintiff in error attacks does not discriminate against some or confer favors, but the act carries out a public purpose and affects alike all cities similarly situated within the State of Illinois.

The case of the *Minneapolis & St. Louis Railway Company* v. *Beckwith*, 129 U. S., 26; 32 L. Ed., 585, was an action brought for the value of three hogs run over and killed by an engine of the Railroad Company. There was a judgment before a justice of the peace and an appeal by the Railroad Company to the Circuit Court, where the judgment was affirmed and to review this latter judgment this case was brought to the Supreme Court of the United States. By Section 1289 of the Code of Iowa, any corporation operating a railroad that fails to fence the same against live stock at all points where such

right to fence exists, shall be liable to the owner of said stock injured or killed by reason of the want of such fence for the value of the property or damage caused unless the same was occasioned by the wilful act of the owner or his agent. The validity of this law was assailed in the state court and was assailed in the Supreme Court as being in conflict with the first section of the Fourteenth Amendment to the Constitution of the United States, in that it deprived the Railroad Company of its property without due process of law and in that it denies to the company the equal protection of the laws. The court says:

> "But this clause does not limit, nor was it designed to limit, the subject upon which the police power of the state may be exerted. The state can now, as before, prescribe regulations for the health, good order and safety of society, and adopt such measures as will advance its interests and prosperity and to accomplish this end special legislation must be resorted to in numerous cases providing against accidents, disease and danger in the varied forms in which they may come. The nature and extent of such legislation will necessarily depend upon the judgment of the Legislature as to the security needed by society. * * * The concluding clause of the first section of the Fourteenth Amendment simply requires that such legislation shall treat alike all persons brought under subjection to it. The equal protection of the law is afforded when this is accomplished."

And again the court says, after reviewing several former decisions:

> "From these adjudications it is evident that the Fourteenth Amendment does not limit the

subject in relation to which the police power of the state may be exercised for the protection of its citizens."

The act in question operates alike upon all cities of the State of Illinois and is uniform in its operation upon all in a like situation and therefore cannot be said to deny the City of Chicago the equal protection of the laws, as its liability is the same as that of any other city in Illinois similarly situated.

The case of the *Missouri Pacific Railroad Co.* v. *Mackey*, 127 U. S., 205, 32 L. Ed., 107, was a case brought to review a judgment for damages to an employee of a railroad company by the negligence of a co-employee of the same company. The court says:

> "At the common law a master or employee could not be held liable for an injury sustained by one servant by reason of the mere negligence of a fellow-servant engaged in the same common employment, the negligence of the fellow-servant not being deemed in such case the negligence of the master; and such was the law of the State of Kansas up to 1874, but at that time this rule of the common law was abrogated, so far as it related to railroad companies, by virtue of a statute which was as follows:
>
> 'Every railroad company organized or doing business in this state shall be liable for all damages done to any employe of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees, to any person sustaining such damage.' "

The jury returned a verdict against the Railroad Company for Twelve Thousand Dollars ($12,000),

which was affirmed by the Supreme Court of the state. The railroad company contended that the law was in conflict with the Fourteenth Amendment to the Constitution of the United States in that it denied to it the equal protection of the law. As to the objection that the law denies railroad companies the qual protection of the laws, the court says:

> "It seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition; but nothing can be further from the fact. The greater part of all legislation is special, either in the objects sought to be attained by it or in the extent of its application. Laws for the improvement of municipalities, the opening and widening of particular streets, the introduction of water and gas, and other arrangements for the safety and convenience of their inhabitants, and laws for the irrigation and drainage of particular lands, for the construction of levees and the bridging of navigable rivers, are instances of this kind. Such legislation does not infringe upon the clause of the Fourteenth Amendment requiring equal protection of the laws, because it is special in its character. If in conflict at all with that clause, it must be on other grounds. And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions. * * * Such legislation is not obnoxious to the last clause of the Fourteenth Amendment, if all persons subject to it are treated alike under similar circumstances and conditions in respect both of the privileges conferred and the liabilities imposed."

From the foregoing cases, and many others de-

cided by this court, we think it is clear that the act complained of does not deny the plaintiff in error the equal protection of the laws, as guaranteed by the Fourteenth Amendment to the Constitution, for, as the Supreme Court of Illinois said in the case of the *Dawson Soap Company* v. *City of Chicago*, 234 Ill., 314:

> "It does not follow that a law is not a general law because it does not operate equally upon every individual or municipal corporation in the state, but a law is a general one which operates alike upon all persons or municipal corporations in the state similarly situated."

We, therefore, contend that the act complained of does not discriminate against the City of Chicago and is, therefore, not in violation of the Fourteenth Amendment to the Constitution guaranteeing the equal protection of the laws.

VII.

The duties and obligations of cities must be ascertained and defined by the laws of the state under which they are created.

Municipal corporations are instrumentalities of the state for the convenient administration of government within their limits. They derive all their powers from the legislature, except where the Constitution of the State otherwise provides, and have only such powers as the legislature confers upon them. Their duties and obligations must be ascertained and defined by the laws of the state which created such municipal corporation.

The legislature of the State of Illinois has absolute power to create municipal corporations in the absence of any constitutional restrictions, and may provide for the organizing, uniting, dividing and annulling of municipal corporations in such manner as it shall deem best to promote the public welfare.

In the case of *The Board of County Commissioners* v. *The Board of the County Commissioners,* 92 U. S., 307, 23 L. Ed., 552, Mr. Justice Clifford, in delivering the opinion of the court, said:

> "Counties, cities and towns are municipal corporations created by the authority of the legislature; and they derive all their powers from the source of their creation, except where the Constitution of the State otherwise provides. Beyond doubt they are, in general, made bodies politic and corporate, and are usually invested with certain subordinate legislative powers, to facilitate the due administration of their own internal affairs, and to promote the general welfare of the municipality. They have no inherent jurisdiction to make laws, or to adopt governmental regulations, nor can they exercise any other powers in that regard than such as are expressly or impliedly derived from their charters, or other statutes of the state.
>
> "*Trusts of great moment, it must be admitted, are confided to such municipalities, and, in turn, they are required to perform many important duties, as evidenced by the terms of their respective charters. Authority to effect such objects is conferred by the legislature,* but it is settled law that the legislature, in granting it, does not divest itself of any power over the inhabitants of the district which it possessed before the charter was granted. Unless the constitution otherwise provides, the legislature still has authority to amend the

charter of such a corporation, enlarge or diminish its powers, extend or limit its boundaries, divide the same into two or more, consolidate two or more into one, overrule its action whenever it is deemed unwise, impolitic or unjust, and even abolish the municipality altogether, in the legislative discretion."

In the case of *United States ex rel. Moses* v. *City Council of Keokuk, Iowa,* in 6 Wall., 514, 18 L. Ed., 933, the court says, on page 934:

"Created as the defendant corporation was, by the law passed by the general assembly of Iowa, and being a municipal corporation in that state, it is quite clear that all the rights, duties and obligations of the corporation must be ascertained and defined by the laws of that state."

In the case of the *City of Chicago* v. *Phoenix Insurance Co.,* 126 Ill., 278, the City of Chicago brought a suit against the Phoenix Insurance Company to recover two per cent. (2%) on the gross receipts of its agency in the City of Chicago, the defendant being a foreign insurance company, the action being brought under an ordinance passed by the City of Chicago and it being claimed that the City of Chicago had power to pass the ordinance under the proviso of an act of the legislature. In discussing the question as to whether or not the City of Chicago had a right to pass such an ordinance, the court said, on page 281:

"But if it should be conceded that the passage of the ordinance was authorized by the section of the City and Village Act, as that act was originally framed, the legislature had the undoubted right, at such time as it saw proper, to divest cities, towns and villages of the power and assume the exercise of the power itself."

And on page 282 the court said:

> "If, therefore, the City of Chicago ever had the power to pass the ordinance under the police power conferred by the City and Village Act that power was taken away by the Act of 1897—it was divested by a later act."

The case of *Wilke* v. *City of Chicago,* 188 Ill., 444, depended upon the legality of an ordinance of the City of Chicago which went into effect in April, 1897, providing that plumbers should obtain a license and pay a fee therefor to the City of Chicago. Shortly after the said ordinance took effect, the legislature passed an act to provide for the licensing of plumbers and to supervise and inspect plumbing. The court says, on page 452:

> "If, however, the city ever had power to exact a license fee of $30.00 for the regulation of the business of plumbing, that power was taken away by the above law which went into force July 1st, 1897. The power to regulate such a business and to grant a license therefor, resides in the legislature, which may grant a license directly or confer the right upon a city. While the legislature may delegate the power to municipalities to grant a lience for a particular occupation, and to exact a license fee, they may at any time take away such power or resume the exercise of it themselves. The legislature may repeal or amend any provision of the act for the incorporation of cities and villages at their pleasure, and if the provisions of the act of 1897 are inconsistent with the power claimed by the city, they will operate as a repeal or amendment of the charter to that extent."

In the case of the *City of Chicago* v. *Burke,* 226 Ill., 191, the court said:

> "If the legislature delegate a power to

> a city they may resume it and in that way deprive municipalities of the right to exercise it."

In the case of *Louisiana* v. *New Orleans,* 109 U. S., 285; 27 L. Ed., 936, it was said, municipal corporations are invested with authority to establish police to guard against disturbance and to prevent violence from any cause, particularly from mobs and riotous assemblages. It is considered as a just burden cast upon them to require them to make good any losses sustained from the acts of such assemblages, which they should have repressed. The imposition has been supposed to create, in the holders of property liable to taxation within their limits, an interest to discourage and prevent any movements tending to such violent proceedings. This liability for the damages is created by a law of the legislature and can be withdrawn or limited at its pleasure.

By Section 1 of Article 8, Chapter 24 of the Cities, Villages and Towns Act of the State of Illinois, the City Council in Cities and Boards of Trustees and Villages are authorized to levy and collect taxes for corporate purposes.

The City of Chicago, acting under such legislative power, collects and imposes taxes upon citizens of the City of Chicago, and it not only obtains this power from the legislature of the state, but all of its powers and duties are given and imposed by said legislature. Such a statute is enacted by virtue of the police power of the state, and similar statutes are sustained upon the ground of public policy. Under the political system of the United States the

states grant a portion of their sovereignty to certain municipalities and clothe them with certain powers and exact from them in return the performance of certain duties. Among the powers granted is that of maintaining a police force and among the duties exacted from them is that of preserving the public peace. There is an implied contract between the state and the municipality upon which it bestows a portion of its sovereignty, that such municipality shall preserve the public peace and maintain good order within its borders, and it is entirely within the power of the sovereign to make such communities responsible for the preservation of order. The privileges conferred must be taken with such burdens as the law imposes and power which is elected thereto. Nowhere in the Constitution of the State of Illinois is there anything which prohibits the legislature from passing an act compelling municipalities to indemnify the owners of property from damages occasioned by mobs or riots. From the foregoing authorities it is clear that a city is subject to the conditions imposed upon it by the legislature, and one of these requirements is that it shall make some recompense for property destroyed by mobs and riots.

VIII.

Said Act does not violate the provisions of the Fourteenth Amendment to the Federal Constitution guaranteeing due process of law.

The plaintiff in error has also assigned as error that said act of the legislature of Illinois is invalid, alleging that it violates the provisions of the Fourteenth Amendment of the Federal Constitution guaranteeing due process of law.

On the trial of the case the City of Chicago appeared by its counsel, who announced that the city would introduce no evidence but would depend on the unconstitutionality of said act as its sole defense. Thereupon the court proceeded to hear evidence on behalf of the plaintiff and entered a judgment in accordance with the evidence against plaintiff in error. Thereupon plaintiff in error appealed to the Supreme Court of Illinois, in which court, after a full hearing, the judgment of the lower court was affirmed. If this be not due process of law said words as used in the constitution have no definite meaning.

The case of *Williams* v. *Eggleston*, 170 U. S., 304, 42 L. Ed., 1047, was a writ of error to review a judgment of the Supreme Court of Errors of the State of Connecticut affirming the judgment of the Superior Court of Hartford County in favor of the Commissioners for the Connecticut River, Bridge and Highway District, for a writ of mandamus against Williams, Treasurer, commanding him to

pay to the plaintiff a certain sum of money in accordance with their order.

For three-fourths of a century prior to 1887 the Hartford Bridge Company had, under a charter from the state, maintained a toll bridge over the Connecticut River at the City of Hartford. On May 19, 1887, the legislature of the state passed an act making said bridge a free public highway and providing for the condemnation of the franchises and other property of the Bridge Company. Proceedings were instituted for ascertaining the value of the property, determining the towns benefited by the establishment of the public highway and apportioning the assessed damages. In this proceeding the damages assessed to the Bridge Company were two hundred ten thousand dollars ($210,000.00), and apportioned between five towns, as follows: To the Town of Hartford ninety-five two hundred and tenths; East Hartford sixty-six two hundred and tenths; Glastonbury twenty-five two hundred and tenths and the Towns of South Windsor and Manchester each twelve two hundred and tenths. The state appropriated from its treasury forty per cent. (40%) of the entire amount, leaving the balance to be paid by these several towns and such sums were paid. The act also provided that this public highway should thereafter be maintained by the towns assessed in proportion to their assessments.

On June 29, 1893, the legislature passed an act providing that said bridge should thereafter be maintained by the State of Connecticut at its expense and that the Governor, with the consent of the Senate, should appoint three commissioners who should con-

stitute a board for the care, maintenance and control of such bridge.

On November 13, 1894, such board, acting through a majority of its members, made a contract with the Berlin Iron Bridge Company for the construction of a new bridge. Some work had been done and material furnished by the company when the old bridge was destroyed by fire. A week thereafter, and on May 24, 1895, the legislature passed an act repealing the act of January 29, 1893, and directing that thereafter the five towns which had been assessed for the benefits accruing from the establishment of the public highway, should maintain that highway, each of them bearing the share of the expense thereof fixed in the assessment proceedings. By the same act a commission was appointed to determine all legal claims and demands arising under, or by virtue, of any contract made and executed by the board appointed under the act of 1893. The act provided that if the award of such Commission was less than forty thousand dollars ($40,000.00), the Comptroller should direct his warrant on the treasurer for the amount thereof. It also provided that if any party, particularly the Berlin Iron Bridge Company, should not be satisfied with the decision of said Commission, it might within three years commence and prosecute a suit against the state in the Superior Court of Hartford County, for any legal claim arising under or by virtue of any valid contract made and executed by said board, and that on final judgment being rendered in such suit, the Comptroller should direct his order to the treasurer for the amout of the judgment, and that, further, if the contract which had

been entered into should be declared valid and binding, the Comptroller should carry out and complete the contract. Under this act the Berlin Iron Company presented its claim to the Commission, which, on December 7, 1895, awarded to it a certain sum.

On June 28, 1895, the legislature passed an act constituting the Towns of Hartford, East Hartford, Glastonbury, Manchester and South Windsor, a body politic and corporate, with power to sue and be sued, under the name of the Connecticut River Bridge and Highway District, for the construction, care and maintenance of a free public highway across the Connecticut River at Hartford. It also created a Board of Commissioners for such district, to consist of eight members, four from the Town of Hartford and one from each of the other towns. The burden of construction and maintenance of this public highway was distributed in a proportion different from that named in the original assessment proceedings, the Town of Hartford being required to pay seventy-nine one hundredths, East Hartford twelve one hundredths and Glastonbury and South Windsor each three one hundredths. For all expenditures the board was directed to draw warrants upon the several towns and such orders were declared sufficient authority for the treasurer of each of said towns to pay the amounts named therein, and the board was authorized to apply to any court of competent jurisdiction for proper writs to compel the enforcement and the execution of its orders. The board having expended the sum of five hundred dollars ($500.00), passed a resolution apportioning the amount and drew a warrant on the treasurer of the

Town of Glastonbury for the sum of fifteen dollars ($15.00). The treasurer of that town refused to pay this order, whereupon on October 16, 1895, the board presented an application to the Superior Court of Hartford County for an alternative writ of mandamus against him. The writ was answered by the treasurer and he set forth, among other defenses, that the act of May 24, 1895, was in violation of the Fourteenth Amendment to the Constitution of the United States because it deprived the towns and citizens thereof of their property without due process of law, and denied them the equal protection of the laws. In affirming the judgment of the Supreme Court of Connecticut, this court said:

> "It is further contended that the acts of May 24, 1895, and June 28, 1895, are in conflict with that portion of the Fourteenth Amendment which forbids the depriving of any person of life, liberty or property without due process of law, because, first, they deprive the town of the right to perform its town duties by officers of their own choosing, which is contrary to the settled practice and law of the state, and arbitrarily destroys the right which those towns had before the Constitution of Connecticut was adopted, and which was not taken away by that instrument; and, secondly, because the acts provided for arbitrarily taking property of the inhabitants of Glastonbury without proper notice of any proceeding under which the property is to be taken and without opportunity to be heard. Whatever may have been the practice of the state in the past, it cannot be doubted that the power of the legislature over all local municipal corporations is unlimited, save by the restrictions of the State and Federal Constitutions, and that these acts in no way violate any provisions of the State Constitution, is settled by the

> decision of the State Supreme Court. When the state court decides that municipal corporations within the territorial limits of the state are subject to the control of the state legislature, and that its act in creating, for certain purposes, a new corporation and merging therein five separate towns was valid, this court cannot hold that the state court was mistaken in its construction of the state Constitution, or in its declaration as to the extent of the power of the legislature over municipal corporations. In casting this burden upon the towns, the legislature did not proceed without a hearing from the towns, for their representatives were in the legislature and took part in the proceedings by which the act was passed. We see nothing in the proceedings which can be said to be in violation of any provisions of the Federal Constitution."

In the case of *Marchant* v. *Pennsylvania Railroad Company,* 153 U. S., 380, 38 L. Ed., 751, the court in discussing the question as to due process of law, as guaranteed by the Fourteenth Amendment to the Constitution, said:

> "It is not possible to hold that a party has, without due process of law, been deprived of his property, when as regards the issues affecting it, he has by the laws of the state a fair trial in a court of justice, according to the modes of proceeding in such case. The party complaining here had a full and fair hearing in a court of the First Instance, and afterwards in the Supreme Court. If this be not due process of law, then the words can have no definite meaning as used in the Constitution."

The contention of plaintiff in error that the said act violates the provision of the Constitution guaranteeing it due process of law, is without force. It appeared at the trial and took part therein and a

judgment was rendered against it, from which judgment it appealed to the Supreme Court of Illinois, where the judgment was affirmed.

The contention of the defendant in error, therefore, is that the said act in no way contravenes the Constitution of the State of Illinois, or of the Constitution of the United States and its amendments, and we, therefore, respectfully urge that the judgment of the Supreme Court of Illinois be affirmed.

Respectfully submitted,

ALMON W. BULKLEY,
FRANK J. LOESCH,
JAMES STILLWELL,
TIMOTHY J. SCOFIELD,
Attorneys for Defendant in Error.

No. 39.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1911.

THE CITY OF CHICAGO,
Plaintiff in Error,
vs.
FRANK STUROES,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

SUPPLEMENTAL AND REPLY BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

WILLIAM H. SEXTON,
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BARNARD & MILLER PRINT, CHICAGO.

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1910.

NO. 208.

THE CITY OF CHICAGO,
Plaintiff in Error,

vs.

FRANK STURGES,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

SUPPLEMENTAL AND REPLY BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

INTRODUCTORY STATEMENT.

MAY IT PLEASE THE COURT:

Since the filing of the Brief and Argument for plaintiff in error herein, The City of Chicago, there has been a change of administration in this city and Messrs. Brundage and Holt, who appear as attorneys of record for plaintiff in error, have resigned from their respective offices of corporation counsel

and assistant corporation counsel. The duty has therefore devolved upon us, as the present counsel for the City of Chicago, to protect its interests in this case.

After a careful study of the questions involved herein, as presented in the brief of our predecessors on behalf of the city and of that of the eminent counsel for defendant in error, we deem it advisable to attempt to point out what in our judgment are the fallacies in the argument for defendant in error and incidentally to supplement to the argument already filed on behalf of the city, in the light of the contentions of our worthy opponents.

In the course of an argument like this it is apparently necessary to make reference to matter already presented in the original brief and argument for plaintiff in error, which may be very aptly used in answer to some of the contentions of the opposition. But because of the confusion occasioned by the different methods of presentation used by counsel in this case, it will be more convenient for us to restate the points urged, not, perhaps, in the language already used, but in our own conception of logical sequence, citing such additional authorities as we have been able to find in support of the points made and answering the arguments for defendant in error as they apply to the points under discussion.

At this point we desire to call the attention of this court to the fact that while the amount of money involved in this particular case is small, the principles involved herein are of great importance to the City of Chicago. There are pending in our state courts several cases brought under the act under considera-

tion, wherein the damages claimed aggregate many millions of dollars. The liability of the City of Chicago in those cases will depend upon the decision of this court in this case. (See *P. C. C. & St. L. Ry. Co.* v. *City of Chicago,* 144 Ill. App. 293.)

POINTS AND AUTHORITIES.

I.

THE ACT CONFLICTS WITH THE SECTION 1 OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, IN THAT IT DEPRIVES CITIES AND COUNTIES OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

A. The Act deprives plaintiff in error of its right to a judicial inquiry upon the question of fact as to whether or not it was derelict in the duties which it owes to the public—to preserve the peace and protect private property.

1. English authority for legislation under the police power of the state is inapplicable to our jurisprudence. In England there are no vested rights. Its police power is absolute and without limitation.

Coke, 4, Inst. 36.

2. To justify legislation in this country under the police power of the state it must appear that the act is reasonably necessary for the accomplishment of the purpose for which it is passed, and not unduly oppressive.

Lawton v. *Steele*, 152 U. S. 133.

3. The act cannot be justified upon the theory that there is an implied contract between the state and the city that the latter shall preserve the peace and maintain good order within its borders. These duties are not contractual obligations, but are imposed upon municipalities *in invitum*. But even if they are contractual the act is unconstitutional because it conclusively presumes a breach of the contract.

4. The proceedings in the state courts in which judgment was rendered against plaintiff in error herein were not due process of law. Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty or property, in its most comprehensive sense; to be heard by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law.

Zeigler v. *South & North Ala. R. R. Company*, 58 Ala. 594.

Chicago, etc., R. R. Co. v. *Minnesota*, 134 U. S. 418.

5. The state has no greater control over the property rights of municipal corporations than of other corporations or individuals.

Dartmouth College v. *Woodward*, 4 Wheaton 518, 694.

New Orleans v. *New Orleans Water Works Company*, 142 U. S. 79.

Williams, Treasurer, v. *Eggleston*, 170 U. S. 304.

City of Louisville v. *Commonwealth*, 1 Duvall (Ky.) 295.

New Orleans, Mobile & Chattanooga Railroad Company v. *City of New Orleans et al.*, 26 La. Annual 478.

Gustave Touchard & Eugene L. Sullivan, Appellants, v. *Desiree Touchard, Respondent*, 5 Cal. 306.

6. The funds of plaintiff in error are its private property and they cannot be taken without due process of law.

Dartmouth College v. *Woodward*, 4 Wheaton 518, 694.

City v. *C. & N. W. Ry. Co.* (Illinois Appellate Court, not yet reported. See certified copy of opinion filed herewith).

People v. *Fields*, 58 N. Y. 491.

II.

THE STATUTE CONTRAVENES THE FOURTEENTH AMENDMENT, IN THAT IT DENIES TO CITIES AND ITS INHABITANTS THE EQUAL PROTECTION OF THE LAW.

The guarantee of the equal protection of the law means that no person or class of persons shall be denied the same protection of the laws which is en-

joyed by other persons or other classes in the same place and in like circumstances.

Missouri v. *Lewis*, 101 U. S. 22.

Barbier v. *Connolly*, 113 U. S. 27.

Cotting v. *Kansas City Stock Yards Company*, 183 U. S. 79.

Connolly v. *Union Sewer Pipe Company*, 184 U. S. 540.

A. The Act arbitrarily discriminates between cities and villages or incorporated towns.

1. To justify legislation affecting a class of persons the classification must bear a reasonable relation to the purposes for which the legislation is aimed.

Gulf, Colorado & Santa Fe Railway Company v. *Ellis*, 165 U. S. 150.

Cotting v. *Kansas City Stock Yards Company, &c.*, 183 U. S. 79.

Connolly v. *Union Sewer Pipe Co.*, 184 U. S. 540.

The People v. *Knopf*, 183 Ill. 410.

Bessette v. *The People*, 193 Ill. 334.

State ex rel. Richards v. *Hammer*, 42 N. J. L. 435.

Hightstown v. *Glenn*, 47 N. J. L. 105.

The People v. *Fox*, 247 Ill. 402.

2. Each city, village or town incorporated prior to the adoption of the Illinois Constitution of 1870 is as similar or dissimilar as their special charters and hence the fact that a municipality was organized under the name of "city" prior to the constitution of 1870, bears no reasonable relation to the

purposes of the act, which is to suppress mob violence and to indemnify the owners of property for damages occasioned by mobs and riots throughout the state.

Art. X, Sec. 1, Illinois Constitution, 1848.
People v. *Board of Trustees,* 170 Ill. 468.

3. Cities and villages or incorporated towns organized since the adoption of the Illinois Constitution of 1870 differ only in the manner of organization. Their rights and powers are identical and their duties and obligations should and must be correspondingly the same.

Chapter 24, Starr & Curtiss' Annotated Illinois Statutes, 1896.

4. The judgment of the state Supreme Court that there is such a difference between cities, villages and towns as to form a rational basis for classification in the act under consideration is not conclusive upon the Supreme Court of the United States.

Yick Wo v. *Hopkins,* 118 U. S. 356.
Balt. & Pot. Railroad v. *Hopkins,* 130 U. S. 210.
Miller v. *Cornwall R. R. Co.,* 168 U. S. 131.
A., T. & S. F. R. v. *Matthews,* 174 U. S. 96.
Houston & Texas Central Rd. Co. v. *Texas,* 177 U. S. 77.
Enfield v. *Jordan,* 119 U. S. 680.

5. The terms "city," "village" or "incorporated town" are not synonymous, nor is the term "city" generic, so as to include "village" or "incorporated town."

Enfield v. *Jordan,* 119 U. S. 680.

Pitzman v. *Freeburg*, 92 Ill. 111.
The People v. *Fox*, 247 Ill. 402.

(*a*) *The act is penal as well as remedial and should be strictly construed.*

Allegheny v. *Gibson*, 90 Pa. 397.
Underhill v. *Manchester*, 45 N. H. 214, 221.

(*b*) *The statute is in derogation of the common law and nothing can be read into it by implication.*

Shaw v. *R. R. Co.*, 101 U. S. 557.
Porter v. *Dement*, 35 Ill. 478.
Thompson v. *Weller*, 85 Ill. 197.
Hamilton v. *Jones*, 125 Ind. 176.
Thornburg v. *Am. Strawboard Co.*, 141 Ind. 443.
Sarazin v. *Union R. Co.*, 153 Mo. 479.

B. The Act arbitrarily discriminates between the inhabitants of the same county and is therefore unconstitutional.

1. The statute gives to owners of property in the county outside the limits of any city a right of action against said county, but does not give such right to owners of property within the same county if within the limits of any city.

Barbier v. *Connolly*, 113 U. S. 27.

2. The statute imposes a burden upon some of the inhabitants of the county (those living within the limits of a city) which is double that imposed upon all other inhabitants of the same county. The former exclusively must bear the burden of indemnifying persons for property destroyed within the limits of their city and must also share the burden of in-

demnification for property destroyed in their county outside the limits of any city; but the latter must only share with the inhabitants of cities in indemnifying owners of property destroyed in the county outside city limits.

Barbier v. *Connolly*, 113 U. S. 27.

ARGUMENT.

I.

THE ACT CONFLICTS WITH SECTION 1 OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN THAT IT DEPRIVES CITIES AND COUNTIES OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

A. The Act deprives plaintiff in error of its rights to a judicial inquiry upon the question of fact as to whether or not it was derelict in the duties which it owes to the public—to preserve the peace and protect private property.

This court will appreciate the difficulty of the task before us in presenting our argument against the validity of our "Mobs and Riots" law, in view of the fact that various state courts have upheld laws in their general scope similar to ours. Inasmuch, however, as the questions here involved have never

been passed upon directly by the United States Supreme Court, there is no authority in this country which controls this case. True it is that a number of learned judges have undoubtedly carefully considered the first point in our argument, and have concluded that there is no merit to it. But to a limited degree the same condition necessarily exists in every case which comes before this court on writ of error to a state court, and we know of no instance in which you have hesitated to overrule the courts of last resort of the various states when their judgments were erroneous.

The state courts have generally upheld statutes imposing a liability upon municipalities for damages occasioned by mob violence upon the theory that such legislation is a proper exercise of the police power of the state. We regard it unnecessary to quote from the various state reports in which the principle upon which such laws are held to be constitutional is discussed, for our own state Supreme Court briefly reviews the early decisions upon the subject and reiterates the principles of law therein announced.

In the case of *City* v. *Cement Co.*, 178 Ill. 372, which was the first in our State Supreme Court in which the constitutionality of our law was attacked, the court, at pages 377-9, said:

> "Statutes similar to ours have been in force in England, as well as in several of the states in this country, for many years, and have uniformly been upheld by the courts. The constitutional right of legislatures to enact such laws under our form of government has been frequently challeged in courts of last resort, and

our attention is called to no case denying that authority. The principle upon which these laws are held to be within the general scope of legislative power is stated in *County of Allegheny* v. *Gibson,* 90 Pa. St. 397, as follows: Speaking of the course of the ancient *English law* on the subject it is said: '*Formerly, as we have seen, a person robbed had his remedy against any inhabitant of the hundred—that is to say, the inhabitants were jointly and severally liable. Then the law was so changed that damages recovered against an individual could be assessed against all the inhabitants, so as to compel contribution. Afterwards, it was still further modified so as to give the right of action against the hundred.* The principle upon which this legislation rested was, that every political subdivision of the state should be responsible for the public peace and the preservation of private property, and that this end could be best subserved by making each individual member of the community surety for the good behavior of his neighbor and for that of each stranger temporarily sojourning among them. The effect was to make each citizen a detective, and on the alert to prevent, as well as to detect and punish, crime. * * * It was evidently a police regulation, based upon the grounds of public policy, and in force without regard to the hardships of particular cases.' And referring to the *Pennsylvania Act,* which is very similar to that under consideration, it is further said: '*Our act of* 1841 *is also a police regulation and rests upon like grounds of public policy. Under our political system the state grants a portion of its sovereignty to certain municipalities. It clothes them with certain of its powers and exacts from them in return the performance of certain duties. Among the powers granted is that of maintaining a police force. Among the duties exacted is that of preserving the public peace. There is an implied contract between the state and every municipality upon*

which it bestows a portion of its sovereignty, that such municipality shall preserve the public peace and maintain good order within its borders. The state lends its aid when the local authorities are overborne and a call for assistance is made in the manner pointed out by law. But it is entirely within the power of the soverign to make such communities responsible for the preservation of order. The privileges conferred must be taken with such burdens as the law-making power chooses to annex thereto.

In *Darlington* v. *Mayor of New York*, 31 N. Y. 164, the Court of Appeals having under consideration the statute of that state, passed in 1855, making counties and cities liable for property destroyed in consequence of mobs, said: 'It can not be doubted but that the general purposes of the law are within the scope of legislative authority. The legislature has plenary power in respect to all subjects of civil government which they are not prohibited from exercising by the constitution of the United States or by some provision or arrangement of the constitution of this state. This act proposes to subject the people of the several local divisions of the state, consisting of counties and cities, to the payment of damages to property in consequence of any riot or mob within the county or city. The policy upon which the act is framed may be supposed to be to make good at the public expense the losses of those who may be so unfortunate as, without their own fault, to be injured in their property by acts of lawless violence of a particular kind which it is the general duty of the government to prevent; and further, and principally, we may suppose, to make it the interest of every person liable to contribute to the public expense to discourage lawlessness and violence and maintain the empire of the laws established to preserve public quiet and social order. These ends are plainly within the purposes of civil government, and, indeed, it is to

maintain them that governments are instituted, and the means provided by this act seem to be reasonably adapted to the purposes in view.'

Except that of the State of Maryland, all of the statutes of this character, so far as we can ascertain, like our own, fix the liability of the municipality without reference to its ability or exercise of diligence to prevent the destruction, and that feature has not been considered by any of the courts passing upon the question, as an objection to their validity. In *County of Allegheny* v. *Gibson, supra*, it was said: 'It may seem a harsh rule to hold a community responsible for the effects of mob violence, which, apparently at least, they had no power to prevent, yet not more so than to hold every inhabitant of the English hundred liable for a robbery of which he knew nothing and had no means of arresting. *In both cases it is a police regulation.* It is based upon the theory that with proper vigilance the act might and ought to have been prevented.' The following authorities either directly pass upon and sustain like statutes or recognize their validity and give force to them: 2 Dillon on Mun. Corp., Sec. 959; *Davidson* v. *Mayor of New York*, 27 How. Pr. 342; *Luke* v. *City of Brooklyn*, 43 Barb. 54; *In re* Pennsylvania Hall, 5 Pa. St. 204; *Underhill* v. *City of Manchester*, 45 N. H. 214; *Williams* v. *City of New Orleans*, 23 La. Ann. 507; *Chadbourn* v. *Town of Newcastle*, 48 N. H. 196; *City of Atchison* v. *Irvine*, 9 Kan. 350; *Bringham* v. *Bristol*, 65 Me. 426; *Clear Lake, etc.*, v. *Lake County*, 25 Cal. 90.''

1.

At the outset let us admit that it is within the police power of the state to pass laws, the object of which is to suppress mob violence. But is such power of the state unlimited, so as to include within its scope indemnification for property destroyed by

mob violence resulting, not from the neglect of the municipality in its duty to preserve the peace and protect private property, but regardless and in spite of the performance of such duty?

As suggested in the case of *City* v. *Cement Co.*, *supra*, the state courts base their decisions upon the precedent of the ancient English law on the subject. But upon looking back through the pages of the history of the English people, we cannot reconcile the theory upon which such legislation was enacted there, with that upon which it must be based in our own country.

In England, prior to the Magna Charta the King was the fountain of all the rights which his subjects enjoyed. The power of the sovereign to interfere with personal liberty and the use of private property was absolute. Although the Great Charter practically divested the King of his absolute control over the conduct of his people, the same power theoretically became lodged in Parliament. There is no law in England to-day, either written or customary, which limits the English Parliament in its legislation, no matter how hurtful it may be to existing conditions of the individual. In England there are no vested rights in any person. Its police power is absolute and without limitation.

> "The power and jurisdiction of Parliament," says Sir Edward Coke in 4, Inst. 36, "is so transcendent and absolute that it cannot be confined, either for persons or causes, within any bounds. And of this high court it may truly be said: '*Si antiquitatem spectes, est vetustissima; si dignitatem est honoratissima; si jurisdictionem est capacissima.*' It hath sovereign

and uncontrolled authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime or criminal; this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies that transcend the ordinary course of the laws are within the reach of this extraordinary tribunal. It can regulate or new-model the succession to the Crown, as was done in the reign of Henry VIII. and William III. It can alter the established religion of the land; as was done in a variety of instances in the reign of King Henry VIII. and his three children. It can change and create afresh even the constitution of the kingdom and of Parliaments themselves, as was done by the act of Union and the several statutes for triennial and septennial elections. It can, in short, do everything that is not naturally impossible; and, therefore, some have not scrupled to call its power, by a figure rather too bold, the omnipotence of Parliament."

In America, the police power of the state is limited by the federal and state constitutions. In determining the power of the states to enact laws of any character, we cannot disregard the constitutional guarantees of due process of law and the equal protection of the laws. English authority for such legislation must therefore be inapplicable to our own jurisprudence.

2.

The act of the legislature of the State of Illinois entitled: "An Act to indemnify the owners of property for damages occasioned by mobs or riots," imposes a liability upon cities and counties for property destroyed or injured in consequence of any mob or riot composed of twelve or more persons, no matter what care, skill or diligence the municipality has exercised to prevent such riot or to protect the property of the claimant, unless, as provided in Section 3 of that act, the destruction of the property was occasioned or in any way aided, sanctioned or permitted by the carelessness, negligence or wrongful act of the owner thereof, or unless the owner shall have failed to use all reasonable diligence to prevent the damage. We respectfully urge that in so far as said act deprives the plaintiff in error of its right to a judicial inquiry upon the question of fact as to whether or not it was derelict in the duties which it owes to the public, said act is unconstitutional and void.

The denial to the municipality of the right to be heard in its defense in an action brought by the owner of property damaged cannot be justified under the police power of the state. In *Lawton* v. *Steele*, 152 U. S. 133, this court, through Mr. Justice BROWN, on page 137, said:

> "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that *the interests of the public generally, as distinguished from those of a particular class, require such interference;* and, second, that *the means are reasonably necessary*

for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts. Thus an act requiring the master of a vessel arriving from a foreign port to report the name, birthplace and occupation of every passenger and the owner of such vessel to give a bond for every passenger so reported, conditioned to indemnify the state against any expense for the support of the persons named for four years thereafter, was held by this court to be indefensible as an exercise of the police power, and to be void as interfering with the right of Congress to regulate commerce with foreign nations. *Henderson* v. *New York*, 92 U. S. 259. A similar statute of California, requiring a bond for certain classes of passengers described, among which were 'lewd and debauched women,' was also held to show very clearly that the purpose was to extort money from a large class of passengers, or to prevent their immigration to California altogether, and was held to invade the right of Congress. *Chy Lung* v. *Freeman*, 92 U. S. 275. So in *Railroad Co.* v. *Husen*, 95 U. S. 465, a statute of Missouri, which prohibited the driving of Texas, Mexican or Indian cattle into the state between certain dates in each year, was held to be in conflict with the commerce clause of the constitution, and not a legitimate exercise of the police powers of the state, though it was admitted that the state might for its self-protection prevent persons or animals having contagious diseases from entering its territory. In *Rockwell* v. *Nearing*, 35 N. Y. 302, an act of the legislature of New York, which authorized the seizure and sale without

> judicial process of all animals found trespassing within private enclosures, was held to be obnoxious to the constitutional provision that no person should be deprived of his property without due process of law. See, also, *Austin* v. *Murray,* 16 Pick. 121; *Watertown* v. *Mayo,* 109 Mass. 315; the Slaughterhouse cases, 16 Wall. 36; *In re* Cheesebrough, 78 N. Y. 232; *Brown* v. *Perkins,* 12 Gray 89. In all these cases the acts were held to be invalid as involving an unnecessary invasion of the rights of property, and a practical inhibition of certain occupations harmless in themselves, and which might be carried on without detriment to the public interests."

In determining what is the purpose of the act under consideration, we must consider what are the proper functions of municipal corporations in the performance of their governmental duties. Clearly, they are organized for the better management of local or internal affairs. Among the duties of such corporations is that of preserving the public peace, but it does not follow therefrom that because the peace of the community is sometimes disturbed and private property is sometimes destroyed that the municipality has thereby violated its duty in this behalf. All that may be required of a municipality is to do everything in its power to preserve the peace and to protect private property. It can not be required to perform a duty which is beyond its physical power to perform.

For a concrete instance of the effect of this statute, we call this court's attention to the facts in the case of *P. C. C. & St. L. Ry. Co.* v. *City of Chicago,* 144 Ill. App. 293. On page 300 the court says:

> "The proof shows that in June, 1896, a general strike was declared by the American Rail-

way Union, and that many thousands of railway employes abandoned their work. This general strike was a sympathetic strike in aid of the employes of the Pullman Company, who had been on a strike since some time in May of that year. The City of Chicago appears to have become the center of the strike hostilities. The employes of the railroads having abandoned their work and refusing to return, the railroads brought to Chicago 'strike breakers' and endeavored to run their trains with these men, many of whom were inexperienced but were willing to take the places of the old employes. When the railroads began to try to operate their trains with the strike breakers and new men, mobs began to gather along the lines of the railroads and interfered with the operation of the trains. Counsel for appellant state in their argument that 'The fact that so many men became idle at once, in connection with the animosities engendered and the doubt and uncertainties existing as to the future relations of the men with the companies, produced a condition somewhat alarming and was supposed to threaten the peace and welfare of the city. The strike also succeeded in stirring up to some extent the rougher elements.' At the commencement of the strike there were 3,000 policemen in Chicago and about 500 more were sworn in on the 5th and 6th of July. The United States marshal, who under ordinary circumstances has ten deputies, had about 1,600 special deputies, all sworn in because of the strike difficulties, and he swore in some 2,600 railway employes as special deputies of the various railroads in Chicago who acted under the direction of the railroad officials during the strike in endeavoring to protect the railroads against the disorderly persons. About 250 of the special deputies were employes of plaintiff and acted under plaintiff's officials. On July 6 the mayor of the City of Chicago sent to the governor of Illinois a request by telegraph

> for the state militia to aid in preserving the peace and suppressing violence. The governor, in compliance with the request, sent several regiments of militia to Chicago. The president of the United States also ordered government troops sent to Chicago to assist in quelling the disturbances. The regular troops arrived in Chicago on the 4th of July. Between the first and seventh days of July, but principally on the sixth, a large amount of railroad equipment and several hundred cars, many of them stored with merchandise, were totally destroyed by fire in the yards of the plaintiff in Chicago."

The Constitution of the United States and that of our own state guarantees to the people the right of peaceable assembly. In an instant human passion may convert a lawful gathering into a riotous mob. In another instant a bomb may be hurled from the mob and life and property shattered to atoms. We can readily conceive that such events may be beyond human possibility to prevent.

Is not the imposition of liability upon a municipality in such cases the taking of means which are *more* than reasonably necessary for the accomplishment of the purposes of the act, which must be to compel the municipality to exercise its duty to the public? And is not the imposition of liability in such cases unduly oppressive?

3.

The act can not be based upon the theory that there is an implied contract between the state and the city that the latter should preserve the public peace and maintain good order within its borders. It is such an elementary principle of the law of

municipal corporations that we deem it unnecessary to cite authority to support the proposition that the duties of preserving the public peace and maintaining order are imposed upon the municipality *in invitum*. If the performance of these duties is a contractual obligation the act is unnecessary. There is a remedy at law for the breach of all contracts. To say that the purpose of the act is to compel cities and counties to perform their implied contracts is to deny the existence of such contracts.

But even if the duties referred to are contractual and the act is nevertheless necessary to compel the municipalities named therein to perform those duties, its scope should not be broader than the purpose for which it is enacted. In an action at law for the breach of a contract the main issue is whether or not there was a *breach*. The act under consideration, however, *conclusively presumes a breach of the implied contract of the municipality* to preserve the public peace.

4.

It is, however, argued by counsel for defendant in error that the City of Chicago is not deprived of its property without due process of law in this case, because an action was commenced pursuant to the statute, the city appeared in answer, contested the case and judgment was entered after a full hearing; that thereupon the City of Chicago appealed to the Supreme Court of Illinois, in which court, after a full hearing, the judgment of the lower court was affirmed:

On page 97 of their argument counsel say:

> "If this be not 'due process of law,' said words as used in the constitution have no definite meaning."

Counsel for defendant in error forget, or misconceive, what is the object of attack in this court. We have no fault to find with the course which the trial court pursued upon the hearing. We concede that in view of the statute under which action was brought the process of law which the trial court set in motion and under which the judgment was rendered against the plaintiff in error herein was "due process," *provided the act itself is constitutional.*

If counsel for defendant in error intend by their argument to convey the impression that the act is constitutional because it provides for *a full hearing* by a court of competent jurisdiction before the city is compelled to make restitution for property destroyed by mob violence, we answer *that is the very issue before this court.*

The case of *Williams* v. *Eggleston*, 170 U. S. 304, cited by counsel for defendant in error in support of the point under discussion, is applicable to another question discussed in their brief, and we shall consider this case at the proper time.

The only other case cited upon this point is *Marchant* v. *Pennsylvania R. R. Co.*, 153 U. S. 380. This was an action at *common law* for the recovery of damages occasioned to the plaintiff in the erection by the defendant company of its elevated road on property belonging to the railroad company abutting that of the plaintiff. The Supreme Court of the State of Pennsylvania, *after a full hearing upon*

the questions of fact and law involved, held the defendant company not liable. Thereupon plaintiff sued out a writ of error to the Supreme Court of the United States, contending that by the judgment of the state court plaintiff in error was deprived of her property without due process of law. This court correctly decided that there was no federal question involved in that case because plaintiff had a full hearing upon all questions of fact and law. In other words, if she was deprived of any property it was by *due process of law.* The case at bar, however, is entirely different, because the action in this case was brought under a *statute which by its very terms deprives the defendant of its right to be heard upon a material element of defense.*

If, however, counsel's contention can be construed to mean that the federal question under the "due process" clause of the United States Constitution is not involved herein by reason of the fact that the City of Chicago had a judicial hearing in this case in the state courts, we must answer that the argument is absurd. If state legislatures can deny to persons the right of appealing to the Supreme Court of the United States for protection under the constitution inhibiting states from passing any law which deprives them of property without due process of law merely by designating the state courts as the instrumentalities for the taking of such property, then the Fourteenth Amendment is no protection whatever.

We can not amplify our argument upon this point any better than to quote from the well considered case of *Zeigler* v. *South & North Alabama R. R. Company,* 58 Ala. 594, 596:

"The only question of importance presented by this record arises on the constitutionality *vel non* of the first section of the act 'To define and regulate the responsibility of the railroads for damage to live stock or cattle of any kind,' approved February 3, 1877. Pamph. Acts, 54. That section enacts 'That from and after the passage of this act, all corporations, person or persons owning or controlling any railroad in this state shall be liable for all damages to live stock, or cattle of any kind, caused by locomotives or railroad cars.' This statute declares that railroad corporations shall be liable and make compensation to the owner for all damages to live stock caused by their locomotives or trains, without any reference to the skill or diligence with which the train is operated. It results that no matter what care, prudence, watchfulness and skilled knowledge those having charge of a train may employ, still, if damage to live stock be caused by the train, the railroad corporation is responsible, unless the person owning such live stock contribute to the injury; but permitting live stock to run at large shall not be considered as contributing to such injury. Section 3 of the act. *It is obvious that under this statute the highest diligence could not avoid frequent injuries to live stock, for which the corporation would be held accountable, if the act be constitutional. Two facts, and two only, are required to be shown to authorize a recovery: Ownership of the property and injury by the locomotive or cars of the railroad. The graver inquiry of capacity and diligence in the conduct of the train, the law assumes to determine or dispense with. Is this 'due process of law' under Section 7 of the Declaration of Rights?* * * *

Judge Cooley, in his work on Constitutional Limitations, quotes with commendation the powerful and lucid definition of the phrase 'due process of law' as given by Mr. WEBSTER in the

great case of *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 581, as follows: '*By the law of the land is most clearly intended the general law; a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.* The meaning is, that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. *Everything which may pass under the form of an enactment is not, therefore, to be considered the law of the land.* If this were so, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments, decrees and forfeitures, in all possible forms would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. * * * *Judges would sit to execute legislative judgments and decrees, not to declare the law, or to administer the justice of the country.*' In another place, during the same argument, speaking of the powers of the legislature and their separation from the judicial functions of the government, he said: '*It (the legislature) shall not judge by act, it shall not decide by act; it shall not deprive by act; but it shall leave all these things to be tried and adjudged by the law of the land.*'

In the case of *Hoke* v. *Henderson*, 4 Dev. Law 1, 15, Chief Justice RUFFIN said: 'The terms, "law of the land," do not mean merely an act of the general assembly. If they did, every restriction upon the legislative authority would be at once abrogated. For what more can a citizen suffer than to be taken, imprisoned, disseized of his freehold, liberties and privileges; be outlawed, exiled and destroyed, and be deprived of his property, his liberty and his life, without crime? Yet all this he may

suffer, if an act of assembly simply denouncing those penalties on particular persons, or a particular class of persons, be, in itself, a law of the land within the sense of the constitution; for what is, in that sense, the law of the land, must be duly observed, and enforced by the courts. * * * The clause itself means that such legislative acts as profess in themselves directly to punish persons, or to deprive the citizen of his property without trial before the judicial tribunals and a decision upon the matter of right, as determined by the laws under which it rested, according to the course, mode and usages of the common law as derived from our forefathers, are not effectually "laws of the land" for those purposes.'

Due process of law undoubtedly means, in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights. * * * They were intended to secure the individual from the arbitrary exercise of the powers of the government, unrestrained by the established principles of private rights and distributive justice.' Cooley Cons. Lim. 355.

Due process of law implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law.

We have held that it is within the power of legislation to declare that certain proofs shall be *prima facie* evidence of specified facts. But, at the same time, we decided that the legislature could not constitutionally ordain that such proof should be conclusive evidence of material

fact in controversy. The first is a mere rule of evidence. The last has been characterized as 'a confiscation of property.' See *Stoudenmire* v. *Brown,* 48 Ala. 699; *Davis* v. *Minge,* 56 Ala. 121; *Oliver* v. *Robinson,* at present term."

A like question was before this court in the case of *Chicago, etc., R. R. Co.* v. *Minnesota,* 134 U. S. 419.

In that case the statute of Minnesota created a railroad commission with authority to fix maximum rates and charges for the conveyance of passengers and freight by railroads. The act provided that the rates fixed by the commission should be conclusive evidence of their reasonableness. This court held that the law so construed conflicts with the Constitution of the United States in that "it deprives the company of its right to a judicial investigation by due process of law under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of the matter in controversy."

5.

It is further argued by counsel for defendant in error that the City of Chicago has not been deprived of its property without due process of law in this case because the act is but an exercise of the legislative control over municipalities. It is contended that the duties and obligations of cities must be ascertained and defined by the laws of the state under which they are created. In support of their argument (see page 91 *et seq.*, brief and argument of defendant in error), they cite *Board of County*

Commissioners v. *Board of County Commissioners*, 92 U. S. 307; *U. S. ex rel. Moses* v. *City*, 6 Wall 514; *City of Chicago* v. *Phoenix Insurance Co.*, 176 Ill. 278; *Wilkie* v. *City of Chicago*, 188 Ill. 444; *City of Chicago* v. *Burke*, 226 Ill. 191; *Louisiana* v. *New Orleans*, 109 U. S. 285; and we might add, although it is cited by counsel under the point which we have just considered in our previous argument, *Williams* v. *Eggleston*, 170 U. S. 304.

There is no doubt that the legislatures of the various states have complete control over the *political powers* of municipalities. The authorities cited by counsel for defendant in error and numerous others support the principle that in the absence of state constitutional limitations a state legislature may create municipal corporations, define their powers and duties, enlarge or diminish and even totally abrogate such powers and duties after their creation or annul their charters entirely without violating the Constitution of the United States.

Thus, a state legislature has the power to diminish or enlarge the area of a county whenever the public convenience or necessity requires, as was done in the case of *Commissioners* v. *Commissioners*, 92 U. S. 307, above cited. It may divest cities, towns and villages of the power to license or regulate business enterprises, as was held in the cases of *City of Chicago* v. *Phoenix Insurance Co.*, 126 Ill. 278; *Wilkie* v. *Chicago*, 188 Ill. 444, and *City of Chicago* v. *Burke*, 226 Ill. 191, above cited. It can withdraw or limit a liability created by its own laws as was decided in *Louisiana* v. *New Orleans*, 109 U. S. 285, above cited.

But it has never been held by this court or any state court of worthy authority that the legislature of the state has *absolute* control over the *proprietary rights* of municipalities of their creation. In the famous Dartmouth College case in 4 Wheaton 518, Mr. Justice STORY, on pages 694-5, says:

> "It may also be admitted that corporations for mere public government, such as towns, cities and counties, may in many respects be subject to legislative control. But it will hardly be contended that even in respect to such corporations, the legislative power is so transcendant that it may at its will take away the private property of the corporation, or change the uses of its private funds acquired under the public faith. *Can the legislature confiscate to its own use the private funds which a municipal corporation holds under its charter, without any default or consent of the corporators?* If a municipal corporation be capable of holding devises and legacies to charitable uses (as many municipal corporations are), does the legislature, under our forms of limited government, possess the authority to seize upon those funds, and appropriate them to other uses, at its own arbitrary pleasure, against the will of the donors and donees? From the very nature of our governments, the public faith is pledged the other way; and that pledge constitutes a valid compact; and that compact is subject only to judicial inquiry, construction and abrogation. This court have already had occasion, in other causes, to express their opinion on this subject; and there is not the slightest inclination to retract it."

This court again recognized that there are rights in a municipal corporation which are protected by the Constitution of the United States in the case of *New Orleans* v. *New Orleans Water Works Company*, 142 U. S. 79:

> "* * * The municipality being a mere agent of the state, stands in its governmental or public character in no contract relation with its sovereign, at whose pleasure its charter may be amended, changed or revoked, without the impairment of any constitutional obligation, while with respect to its private or proprietary rights and interests it may be entitled to the constitutional protection. * * *"

(See also *Williams* v. *Eggleston*, 170 U. S. 304; *City of Louisville* v. *Commonwealth*, 1 Duvall (Ky.) 295; *Touchard* v. *Touchard*, 5 Cal. 306.)

The distinction which the courts make is clear that as to their *governmental* powers and duties the state has *absolute control* over its municipalities, but as to their *proprietary rights they are protected by the Fourteenth Amendment of the United States Constitution to the same extent as private corporations.*

In *New Orleans, etc., Railroad Company* v. *Rawlins*, 26 La. Annual Rep., at page 481, the court says:

> "A municipal corporation is appropriately defined to be the investing the people of a place with the local government thereof.' Salk. 183. It has no powers not conferred upon it expressly or by fair implication, by the law of the state creating it or statutes applicable to it. Both the persons and the place inhabited by them are indispensable to the constitution of such a corporation. It is an agency to regulate and administer the internal concerns of a locality in matters peculiar to the place incorporated and not common to the state or people at large; but duties and functions may be and are conferred and imposed, not local in their nature. *It possesses two classes of powers and two classes of rights—public and private. In all that relates*

to one class it is merely the agent of the state and subject to its control; in the other it is the agent of the inhabitants of the place—the corporators—maintains the character and relations of individuals, and is not subject to the absolute control of the legislature, its creator. Among this latter class is the right to acquire, hold and dispose of property, to sue and be sued, etc. It is true these rights are originally derived from the legislature; but once conferred they are to be exercised, while it exists, at the will of the corporation, in its own, and as to its own interest, for the inhabitants, just as certain rights are conferred on private corporations and persons, not *sui juris*, as minors and married women, but are not afterwards under the control of the legislature. Dillon on Municipal Corporations, second edition, chapter 71, Sections 9A to 10A, chapter 4, sections 38-40 and notes; Cooley's Constitutional Limitations, pp. 235-6, 289.

In Section 39 Mr. Dillon says: 'It may assist to an understanding of the extent of legislative power over municipal corporations proper (incorporated towns and cities) to observe that these, as ordinarily constituted, possess, according to many courts, a double character—the one governmental, legislative or public; the other, in a sense, proprietary or private. The distinction between these, though sometimes difficult to trace, is highly important and is frequently referred to, particularly in the cases relating to the implied or common law liability of municipal corporations for the negligence of their servants, agents or officers in the execution of corporate duties and powers. In its governmental or public character the corporation is made, by the state, one of its instruments, or the local depository of certain limited and prescribed political powers, to be exercised for the public good, on behalf of the state, and not for itself. In this respect it is assimilated, in its

nature and functions, to a county corporation, which, as we have seen, is purely part of the governmental machinery of the sovereignty which creates it. *Over all its civil, political or governmental powers, the authority of the legislature is, in the nature of things, supreme and without limitation, unless the limitation is found in some peculiar provision of the Constitution of the particular state. But in its proprietary or private character, the theory is that the powers are supposed not to be conferred, primarily or chiefly, from considerations connected with the government of the state at large, but for the private advantage of the particular corporation as a distinct legal personality; and as to such powers and to property acquired thereunder, and contracts made with reference thereto, the corporation is to be regarded as quo ad hoc, a private corporation, or, at least, not public, in the sense that the power of the legislature over it is omnipotent.'*

Mr. Cooley, at page 238, says: 'The rule upon the subject we take to be this: Where corporate powers are conferred, there is an implied compact between the state and the corporators that the property which they are given the capacity to acquire for corporate purposes, under their charter, shall not be taken from them and appropriated to other uses. If the state grants property to the corporation, the grant is an executive contract which can not be revoked. The rights acquired either by such grants or by any other legitimate mode in which such a corporation can acquire property, are vested rights, and can not be taken away.'

In 29 Vermont, p. 12. it was said: 'But while the legislative power (to enlarge, restrain or even destroy municipal corporations, as the public interests may require) may be exercised over public and municipal corporations, it has uniformly been held that towns and other public corporations may have private rights and interests vested in them under their charter; and

as to those rights they are to be regarded and protected the same as if they were the rights and interests of individuals or private corporations.'

In 18 Cal. 590, Mr. Chief Justice FIELD, as the organ of the court, takes the ground that the *real estate or private property of a municipal corporation is protected by the clause in the national constitution securing the inviolability of contracts;* that all legislative authority over it must be exercised in subordination to this guarantee, and that it is subject to legislative control to the same extent, but no greater extent, than all other property in the state.

In 9 Cranch (U. S.) 336 and 52, Mr. Justice STORY expresses the opinion that, 'in respect to public corporations, which exist only for public purposes, such as counties, towns, cities, etc., the legislature may, under proper limitations, have a right to change, modify, enlarge or restrain them, securing, however, the property for the uses of those for whom and at whose expense it was originally purchased.' This is reiterated by Chancellor Kent, 2 Com. 305, and by Mr. Justice Washington in Dartmouth College case, 4 Wheat. 518, 663. In this last case Mr. Justice STORY, at page 694, says: '*But it will hardly be contended that, even in respect to such corporations, the legislative power is so transcendent that it may, at its will, take away the private property of the corporation, or change the uses of its private funds acquired under the public faith.*'

In 18 L. 213 it is said: 'Urban property fronting on a water course is entitled to alluvion as well as rural estates; and cities may acquire *jure alluvionis*, but it must be as proprietor of the front or riparian proprietor.' See also 10 An. 54, and 7 An. 505.

We are aware that very different views have been expressed by very high authority, and that some of the authors and jurists from whom we

have quoted have used language susceptible of a different construction, and declared the division of municipal powers into public and private unsatisfactory; *but after a careful consideration of the opinions on both sides, we have come to the concluson that a municipal corporation may own property, to and over which the legislature has, while such corporation exists, no right or control in opposition to or independently of the will or consent of the corporation;* and we think this is consonant with justice. There is a principle involved in it—the principle that those who have to pay should have a voice in the disposal of what is paid for—a principle which is a barrier to centralized or organized power—a principle that protects every person in the control of his own private affairs—a principle which the judiciary is intended to maintain.

The theory or argument that the legislature has absolute ownership and control of all the property and rights of a municipal corporation, because the corporation is represented in the legislature, is not conclusive. Such representation is only in matters properly within legislative action, just as the representation of all other portions and inhabitants of the state. The private rights of the corporation are as much protected as those of individuals. And it is a fact, manifest to all, that the incorporation of such a city as New Orleans is a necessity. The multiplying and complicated interests of the compact and community are such that the legislature can not administer them, and some of them are of such a nature as not to be within mere legislative action, but are to be conducted under general rules, thus necessitating the creation of an intellectual body, with something more than governmental functions, but which do not constitute an *imperium in imperio.*"

6.

It may, however, be argued that inasmuch as the corporate funds of a municipality are raised by taxation the state legislature may direct their use as it sees fit, and in so doing the state merely exercises its control over the *governmental* power of the municipality to levy taxes.

The act does not provide that the city or county shall pay all judgments rendered thereunder by levying a special tax for that purpose. It provides for the payment of such judgments "in due course as in case of other judgments." Judgments generally are not necessarily paid by levying a tax for such purpose. If there are sufficient funds in the treasury they must be paid from such funds. In most instances the City of Chicago raises money for the payment of judgments by issuing its general corporate bonds and selling them in the market.

Although municipal funds may be raised by taxation, they are nevertheless the *private* property of the corporation. If this were not true, a municipal corporation could have no private property, for all of its property in the first instance is acquired with such funds. These funds are private in the sense used by the authorities cited so that the power of the legislature over it is not omnipotent.

In the case of *City* v. *C. & N. W. Ry. Co.*, decided by the Appellate Court for the First District of Illinois (a certified copy of which opinion is herewith filed), the distinction between the *public* rights and *private* rights of a municipality is clearly made.

An action was brought by the City of Chicago

against the Chicago & Northwestern Railway Company, a corporation, for damages for the killing of three horses owned by the city and used in conducting and maintaining a fire department. The issue involved was whether or not the statute of limitations applied to such actions, it being admitted that the statute does not run against a municipality in actions involving strictly public rights. The court said:

> "The well settled law in this state is that the statute of limitations will not run against a municipal corporation in actions involving strictly public rights. *Brown* v. *Trustees of Schools*, 224 Ill. 184, and cases there cited. Controversies over the application of this rule more frequently arise from a failure to understand what are and what are not 'public rights' than from a failure to understand the rule. *In a sense, every right possessed by a municipal corporation is a public right, and every class of property held by it is held in its public capacity, and for public use, but for the purpose of distinguishing such rights, as only that part of the public included within the corporate limits of a municipality are interested in, from such rights in which all the people of the state are interested, the former class is designated by law writers and courts as 'private rights,' and the terms 'public rights,' 'public uses' and 'public capacity' are used only with reference to such rights, uses and capacities as all the people of the state are alike interested in.* To actions brought in relation to 'public rights,' using the term to indicate such rights as belong to all the people of the state alike, the statute of limitations does not apply, while as to actions brought in relation to 'private rights,' using that term to designate such rights as are limited to some local subdivision or municipality, such as a city, village, school district or the

like, the statute of limitations applies to the same extent as to individuals. *Brown* v. *Trustees of Schools, supra;* Dillon on Municipal Corporations, 3d Ed., Vol. 2, Sec., 675.

As illustrative of the class of rights that are strictly public, and to which the statute of limitations does not apply, the Supreme Court in the Brown case points out the use of streets and highways which, while they are maintained by municipalities or political subdivisions of the state, are not so maintained for the use of the inhabitants of such municipality or locality alone, but are maintained for the free and unobstructed use of all the people of the state. In that connection the Supreme Court, on page 188 of that opinion, uses the following language:

'Such rights are clearly distinguishable from the rights or interests of the inhabitants of a locality in property acquired for a mere local use, such as city offices, a library site, or the use of a fire department. Such property is held and used for strictly local purposes.'

The stipulated facts on which this case was tried show that the horses in question were purchased by plaintiff in error, and were its property. Only such persons as reside or own taxable property within the limits of the City of Chicago were injured by the loss of these horses, or could be benefited by a recovery for such loss. They were purchased by the city with its own money, and could have been sold by the city without let or hindrance from the people of the state at large, or any officer or set of officers of the state, and in case of such sale, or a recovery for their loss, the money would have belonged to the city.

Plaintiff in error cites the case of *Wilcox* v. *City of Chicago*, 107 Ill. 334, and the case of *Tollefson* v. *City of Ottawa*, 228 Ill. 134, as a holding that the city, in maintaining a fire department, was acting in its public or govern-

mental capacity, as distinguished from its private or corporate capacity, and was, therefore, not liable under the principle of *respondeat superior* for the negligence of its officers conducting that department. and argues therefrom that the property used by it in maintaining its fire department is held by it for the use of the general public. These cases clearly have no bearing on the question here before this court. Whether a fireman, a policeman or a nurse at the hospital are servants or officers of the city, or whether the city is liable under the principle of *respondeat superior* for the negligent acts of such persons, can, it seems to us, throw no possible light on the question as to what capacity and for whose benefit the property used by these several persons in the performance of their duties is held by the corporation. What is said in those cases to the effect that the city was not interested in its 'corporate capacity' in the services rendered by the firemen, and that such firemen, in rendering such service, acted rather as officers of the city, charged with a 'public service,' was said with reference to the distinction between what are sometimes called public or governmental powers and powers that are private or proprietary. Neither of these classes of powers have any relation to persons or rights outside of the corporate limits of the municipality clothed with them. Public legislative or governmental powers, as referred to in these opinions, are such powers as are conferred upon such municipalities to enable them the better to aid the state in properly governing that portion of its people residing *within the municipality.* A private or proprietary power or franchise, as referred to in these opinions, is one of an exceptional or non-municipal nature, which sometimes is conferred upon municipalities, and are frequently conferred on private corporations or individuals, as, for example, the power to erect a public wharf and

charge tolls for its use, or to supply its inhabitants with water or gas, charging them therefor and making a profit thereby. Dillon on Municipal Corporations, Vol. 1, Sec. 39.

We are clearly of the opinion that the horses in question were the private property of the corporation, and that no public right, properly so called, is involved in this litigation."

And so in the case at bar the *citizens and taxpayers* of the City of Chicago *only* are interested in its funds raised by taxation. Corporate funds are acquired for mere *local use,* for strictly *local purposes,* and are subject to the *control* of the *city council only.* They are not *public property* in the sense that the people of the state at large have any interest therein and may control its use.

However, a great portion of the funds of a municipal corporation is acquired from other sources than taxation. Corporate funds may be acquired by an issue of bonds and it is held that such funds are the *private* property of a municipality. (*People* v. *Fields,* 58 N. Y. 491.)

Municipal funds may be acquired by the sale of such of its personal property as horses, wagons, machinery, office furniture and innumerable other kinds of personalty which a municipal corporation may own or possess in the conduct of its business; they may come from the sale or leasing of any of its real estate. Funds may be acquired from such legitimate municipal *private* enterprises as the manufacture, sale and distribution of gas, electricity and water, the operation of street railways and telephone systems. Funds may be acquired by private donation or as compensation for purely local priv-

ileges. The moneys collected from all such sources may be placed in a general corporate fund, and it would then be subjected to the payment of the indemnity provided for by the act without the consent and against the will of the municipality.

II.

THE STATUTE CONTRAVENES THE FOURTEENTH AMENDMENT, IN THAT IT DENIES TO CITIES AND ITS INHABITANTS THE EQUAL PROTECTION OF THE LAW.

A.

The Act arbitrarily discriminates between cities and villages or incorporated towns.

The act provides that:

> "Whenever any building or other real or personal property, except property in transit, shall be destroyed or injured in consequence of any mob or riot composed of twelve or more persons, the city, or if not in a city, then the county in which such property was destroyed, shall be liable to an action by or in behalf of the party whose property was thus destroyed or injured, for three-fourths of the damages sustained by reason thereof."

It will be seen that *villages* or *incorporated towns* are not expressly included in the act. For this reason we urge the act arbitrarily discriminates between *cities* and *villages* or *incorporated towns* and thereby denies to *cities and its inhabitants* the equal protection of the law.

This court has defined that clause of the Fourteenth Amendment guaranteeing the equal protection of the law as meaning "that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes of persons in the same places and in like circumstances." (See *Missouri* v. *Lewis*, 101 U. S. 102; *Barbier* v. *Connolly*, 113 U. S. 27; *Cotting* v. *Kansas City Stock Yards Company*, 183 U. S. 79; *Connolly* v. *Union Sewer Pipe Company*, 184 U. S. 540.)

1.

It is, however, argued by counsel for defendant in error that the law applies to all within a given class of municipalities, and is, therefore, a general law. But to justify legislation affecting a class of persons, the classification must bear a reasonable relation to the purposes for which the legislation is aimed. (*Gulf, Colorado & Santa Fe Railway Company* v. *Ellis*, 165 U. S. 150; *Cutting* v. *Kansas City Stock Yards Company, etc.*, 183 U. S. 79; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *The People* v. *Knopf*, 183 Ill. 410; *Besette* v. *The People*, 193 Ill. 334; *State ex rel. Richards* v. *Hammer*, 42 N. J. L. 435; *Hightstown* v. *Glenn*, 47 N. J. L. 105; *The People* v. *Fox*, 247 Ill. 402.)

None of the cases cited by counsel for defendant in error in their argument in support of their contention that, because the law applies to all cities, the act does not violate the Constitution guaranteeing the equal protection of the laws, conflict with the authorities hereinabove last cited.

In the case of *Minneapolis Railroad Co.* v. *Beckwith*, 129 U. S. 26, it was held that a statute compelling a railroad to fence its right of way so as to prevent injury to live stock, and imposing a liability upon the railroad for damages to live stock injured or killed by reason of the want of such fence, unless the damage was occasioned by the wilful act of the owner or his agent, is constitutional, although the act applied only to railroads, because the necessity of fencing a right of way applies peculiarly to railroads. On page 28 the court says:

> "We will consider the objections of the railway company in the reverse order in which they are stated by counsel. And first, as to the alleged conflict of the law of Iowa with the clause of the Fourteenth Amendment ordaining that no state shall deny to any person within its jurisdiction the equal protection of the laws. That clause does undoubtedly prohibit discriminating and partial legislation by any state in favor of particular persons as against others in like condition. *Equality of protection implies not merely equal accessibility to the courts for the prevention or redress of wrongs and the enforcement of rights, but equal exemption with others in like condition from charges and liabilities of every kind.* But the clause does not limit, nor was it designed to limit, the subjects upon which the police power of the state may be exerted. The state can now, as before, prescribe regulations for the health, good order and safety of society, and adopt such measures as will advance its interests and prosperity. And to accomplish this end special legislation must be resorted to in numerous cases, providing against accidents, disease and danger, in the varied forms in which they may come. The nature and extent of such legislation will necessarily depend upon the judgment of the legisla-

ture as to the security needed by society. When the calling, profession or business of parties is unattended with dangers to others, little legislation will be necessary respecting it. Thus, in the purchase and sale of most articles of general use, persons may be left to exercise their own good sense and judgment; but when the calling or profession or business is attended with danger, or requires a certain degree of scientific knowledge upon which others must rely, then legislation properly steps in to impose conditions upon its exercise. Thus, if one is engaged in the manufacture or sale of explosive or inflammable articles, or in the preparation or sale of medicinal drugs, legislation, for the security of society, may prescribe the terms on which he will be permitted to carry on the business, and the liabilities he will incur from neglect of them. The concluding clause of the first section of the Fourteenth Amendment simply requires that such legislation shall treat alike all persons brought under subjection to it. The equal protection of the law is afforded when this is accomplished."

But in the case at bar there is nothing in the character of municipal corporations organized as *cities* which renders it more necessary that they shall maintain order and protect private property against mob violence or which renders them more capable of preserving the public peace within their borders than those municipalities organized as *villages* or *incorporated towns*.

In *Missouri Pacific Railroad Co.* v. *Mackey*, 127 U. S. 205, a statute of Kansas modified the common law of fellow servants as applied to a railroad company. The court held that law constitutional, because the nature of railroad employment was con-

sidered hazardous, and, therefore, the classification bore a reasonable relation to the purposes of the act.

In *Gulf, Colorado & Santa Fe R. R. Co.* v. *Ellis, supra,* Mr. Justice BREWER, on page 155, said:

> "But it is said that it is not within the scope of the Fourteenth Amendment to withhold from states the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true, *Hayes* v. *Missouri,* 120 U. S. 68; *Railroad Company* v. *Mackey,* 127 U. S. 205; *Walston* v. *Nevin,* 128 U. S. 578; *Bell's Gap Railroad* v. *Pennsylvania,* 134 U. S. 232; *Pacific Express Co.* v. *Seibert,* 142 U. S. 339; *Giozza* v. *Tiernan,* 148 U. S. 657; *Columbia Southern Railway* v. *Wright,* 151 U. S. 470; *Marchant* v. *Pennsylvania Railroad,* 153 U. S. 380; *St. Louis & San Francisco Railway* v. *Mathews,* 165 U. S. 1; yet it is equally true that such classification can not be made arbitrarily. The state may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

And at the bottom of page 157 the court, continuing, said:

> "That such corporations may be classified for some purposes is unquestioned. The business

in which they are engaged is of a peculiarly dangerous nature, and the legislature, in the exercise of its police powers, may justly require many things to be done by them in order to secure life and property. Fencing of railroad tracks, use of safety couplers and a multitude of other things easily suggest themselves. And any classification for the imposition of such special duties—duties arising out of the peculiar business in which they are engaged—is a just classification, and not one within the prohibition of the Fourteenth Amendment. Thus it is frequently required that they fence their tracks, and as a penalty for a failure to fence double damages in case of loss are inflicted. *Missouri Pacific Railway* v. *Humes*, 115 U. S. 512. But this and all kindred cases proceed upon the theory of a special duty resting upon railroad corporations by reason of the business in which they are engaged—a duty not resting upon others; a duty which can be enforced by the legislature in any proper manner; and whether it enforces it by penalties in the way of fines coming to the state, or by double damages to a party injured, is immaterial. It is all done in the exercise of the police power of the state and with a view to enforce just and reasonable police regulations."

But what greater duty does a city owe to its inhabitants or to the state at large than does a village or incorporated town? What greater powers or privileges does it enjoy? Is the classification based upon the theory that cities by reason of their greater population are more able to handle mobs or riots, or are more financially able to pay the damage? It has already been demonstrated in the original argument for plaintiff in error (pages 15, 16) that cities are not necessarily more populous than villages or incorporated towns. If the difference in

population bears any reasonable relation to the purposes of this legislation, why did not the legislature impose a liability upon all cities and villages of over a designated population?

In the case of *Anderson* v. *City of Trenton*, 42 N. J. L. 486, cited by counsel for defendant in error, it was held that a classification of cities according to their population was proper in an act empowering such cities to issue bonds to fund floating debts. It would therefore appear that the language used by the court:

> "* * * Doubtless, a law embracing all cities or all townships would be constitutional; for these bodies, because of their marked peculiarities, are, by common consent, regarded as distinct forms of municipal government, and so constituting classes by themselves,"

is dictum.

It is apparent that while for certain purposes a classification may be made between cities and villages or incorporated towns, for other purposes such classification may not be made. Each statute discriminating between various kinds of municipalities must be construed in relation to the purposes of the act under consideration. In *State ex rel. Richards* v. *Hammer*, 42 N. J. L. 435, the principle of law applicable in such cases is clearly laid down. On page 440 the court says:

> "Plainly, a law may be general in its provisions, and may apply to the whole of a group of objects having characteristics sufficiently marked and important to make them a class by themselves, and yet such law may be in contravention of this constitutional prohibition. Thus, a law enacting that in every city in the state in

which there are ten churches, there should be three commissioners of the water department, with certain prescribed duties, would present a specimen of such a law, for it would sufficiently designate a class of cities, and would embrace the whole of such class, and yet it does not seem to me that it could be sustained by the courts. If it could be so sanctioned, then the constitutional restriction would be of no avail, as there are few objects that cannot be arbitrarily associated, if all that is requisite for the purpose of legislation is to designate them by some quality, no matter what that may be, which will so distinguish them as to mark them as a distinct class. *But the true principle requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which thus serve as the basis of objects so designated as peculiarly requiring exclusive legislation. There must be substantial distinction, having a reference to the subject-matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded. The marks of distinction on which the classification is founded must be such, in the nature of things, as will, in some reasonable degree, at least, account for or justify the restriction of the legislation.* Principles of this sort can be best elucidated by examples. I have already given a sample of a merely arbitrary classification, founded on no causal relation between the subject-matter of such legislation and the things so classified. A sample of the other, or legitimate kind, would be signified, in a law that should give to all cities in the state situated on tidewater the privilege of using such waters in connection with their sewers. In such an enactment, but a part of the cities of the state would be embraced, but the classification would be lawful and proper, inasmuch as the places embraced would be possessed of a characteristic distinct from those possessed

by the excluded places, such characteristic being of such a nature as to afford a reasonable ground for such special legislation. In the two classes of instances thus exemplified, the basis of the classification of the one would be by a reference to marks of distinction having no connection with the substance of the supposed statute; in the other, the opposite of this would obtain—so that, in the former, the classification would be formal and arbitrary; in the latter, substantial and springing out of the nature of the subject of this legislation."

In the case of *Hightstown* v. *Glenn*, 47 N. J. L. 105, the court presents our very argument in this case. On page 107 the court says:

"For another reason the Act of March, 1883, must be regarded as special and local in its operation, and therefore void. Hightstown has a population of less than fifteen hundred, and is therefore in the third class of boroughs.

But the act does not apply to the City of Egg Harbor, which has a population of less than fifteen hundred, because it is incorporated as a city, and is therefore not included by the act in question. The City of Egg Harbor has the exclusive power by its common council to grant licenses. So the cities of Woodbury, Beverly and Cape May, with a population between fifteen hundred and three thousand, are classified for legislation as cities of the third class, while the Villages of Orange and Irvington and the boroughs of Washington, South Orange and others of like population are classified for legislation as boroughs of the second class.

The same observation is true with regard to the first class of boroughs. *Thus, it appears that the classification acts of* 1882 *and* 1883 *are not general in their operation even upon the basis of population. Legislation under this classification will not apply to certain municipal corporations, incorporated as cities, which would*

apply to them if incorporated as boroughs or villages. The mere change of name from city to borough will take them out of the operation of one class of legislation and subject them to the operation of another and different class."

And so our own state Supreme Court has likewise held that a classification which includes cities, and not villages or incorporated towns, is for certain purposes an arbitrary classification.

In *People* v. *Fox*, 247 Ill. 402, at page 407, the court says:

"Again, *it is an unauthorized discrimination in favor of cities against villages and towns having an equal or greater population.* An incorporated village or town which has attained a population of 20,000 or upwards is charged with the burden of maintaining its streets, alleys and bridges just the same as a city that has attained that population, and if the legislature has authority to grant a city the right to receive and control the expenditure of all the tax levied and collected under Sections 13 and 14 on property within its limits, we see no reason why the same privilege should not be granted a village or town under like circumstances and similarly situated. While, as we have said, it is competent for the legislature to classify cities for governmental purposes and to enact laws applicable to such class, this authority is not absolute, but is subject to constitutional restrictions. 'There must be some reasonable relation between the situation of municipalities classified and the purposes and objects to be attained. There must be something, in the nature of things, which in some reasonable degree accounts for the division into classes.' (*People* v. *Knopf*, 183 Ill. 410.) Unless there be some substantial reason, based upon differences in circumstances or conditions, which will justify the classification, the exclusion of villages and towns from the benefits to

be derived from the control of the expenditure of all the tax collected under Sections 13 and 14 is a grant of a special privilege to the cities included within the class and is in violation of Section 22 of Article 4 of the constitution, which prohibits the passage of local or special laws granting to any corporation, association or individual any special or exclusive privilege or immunity. That villages and towns may avail themselves of the benefits of said third proviso by becoming cities is no answer to the objection that it confers special privileges upon cities which are denied to other municipal corporations similarly situated. *The fact that a municipality has adopted the form of government provided for cities affords no reasonable basis for conferring upon it benefits and privileges withheld from villages of equal population, and differing from cities only in that they have not thought proper or desirable to incorporate as cities.* This is not in conflict with the rule announced in cases sustaining acts of the legislature which are to apply only to municipalities adopting them."

2.

Counsel for defendant in error also argue that the act does not arbitrarily discriminate between cities, villages and incorporated towns, because the powers of cities and villages organized under the laws of the State of Illinois are not identical. In the course of their argument they show that [redacted] cities organized under special charters, to which the act under consideration applies, have greatly different powers than cities or villages organized under the general law, and that many of the cities which have adopted the general law now in force still retain the special powers granted in their special charters at the time of their incorporation. A number of authorities are cited upon this point.

We cannot follow the argument of counsel for defendant in error and we do not understand how the facts above indicated have any bearing upon the question as to whether the legislature may for the purposes of the act involved distinguish between all cities, whether organized under special charters or under the general law, and all villages, whether organized under special charter or under the general law.

The governmental agencies in our state, as in every other state, may be divided into municipal corporations and public quasi corporations. (Dillon Mun. Corp., 5th Ed., Sec. 34.) In our state, we have the congressional township, which under the act of Congress is organized for school purposes and may be classed as a quasi corporation. Again, we have county government, and town or township government, being synonymously used under the Illinois statutes relating to township government. (Chap. 139, Starr & Curtiss' Ann. Ill. St. 1896.) These towns or townships are subdivisions of the county and are also quasi corporations. Of the purely municipal corporations in the State of Illinois, we have cities, villages and incorporated towns, all of which are incorporated either by special act prior to the constitution of 1870 (see Art. X, Sec. 1 Ill. Const. of 1848), or by general act subsequent to the constitution of 1870. (Chap. 24, Starr & Curtiss' Ann. Ill. St. 1896.)

We are concerned in this argument only with the purely municipal corporations, contending that the act arbitrarily discriminates between cities and villages or incorporated towns. It has already been shown that under our Cities and Villages Act the

courts of our state, as well as this court, have held that a village is an incorporated town, and our Cities and Villages Act applies as well to incorporated towns organized thereunder as to villages.

Necessarily, each city, village or town incorporated prior to the adoption of the Illinois constitution of 1870 is as similar or dissimilar as their special charters, and hence the fact that a municipality was organized under the name of "city" prior to the constitution of 1870 bears no reasonable relation to the purposes of this act, which is, to suppress mob violence and to indemnify the owners of property for damages occasioned by mobs and riots throughout the state.

In *People ex rel John Y. Thorp et al.* v. *Board of Trustees of Town of Normal*, 170 Ill. 468, it was held that an act which attempts to put certain special charter municipalities into a class by themselves, basing such classification, not upon any rule for classifying municipalities or any circumstances affecting them differently from other municipalities in the city, but merely upon a different provision in their charters from those of other municipalities, and a preference of the electors for such provision, is unconstitutional. The court says, on p. 472, quoting from *People* v. *Cooper*, 83 Ill. 585:

> "It is not admissible either by the letter or the spirit of the constitution that dissimilarity in character of organization or powers, in municipalities of the same class or grade, shall be created or perpetuated by enactments of the General Assembly."

3.

The only difference between cities and villages organized since the adoption of the constitution of 1870 is in the manner of their internal organization. The government of cities is entrusted to a mayor and common council. The government of villages or incorporated towns is delegated to a president and board of trustees. All the powers and duties of cities, villages or incorporated towns are enumerated in our Cities and Villages Act under the following clause:

> "The city council in cities and president and board of trustees in villages shall have the following powers."

Thus it may be seen that the rights and powers of cities and villages or incorporated towns organized since the adoption of the Illinois constitution of 1870 are identical.

In proportion to their population, whether a municipal corporation be organized as a city or a village, their inherent ability to maintain order and protect private property within their respective borders are identical. Their financial ability to indemnify owners of property destroyed by mob violence certainly cannot differ according to whether they are organized as cities or villages. How, then, can it be said that there is such a rational difference between cities and villages and incorporated towns in the State of Illinois, as to permit of a distinction between cities and villages or incorporated towns in an act, the purpose of which is to suppress mobs and riots, and to indemnify the owners of property

for damages occasioned by mobs and riots throughout the state?

4.

It is further argued by counsel for defendant in error that the Supreme Court of the State of Illinois, after an examination of its laws relating to cities and villages or incorporated towns, has held that there is such a difference between cities, villages and towns as to form a rational basis for classification, and they say, on page 29 of their argument, that "such classification under said various laws can not be questioned here." And again, on page 33, they say in effect, that whether or not there is a sufficient difference between cities and villages depends upon the construction of the statutes of the State of Illinois and that this court cannot inquire into the grounds and reasons for the decision of the Supreme Court of Illinois in the construction of its statutes.

Counsel for defendant in error cite no authority in support of their contention that the Supreme Court of the United States cannot construe a state statute as it should be construed when the question before the court is whether or not the act operates upon persons unequally. If the contention of counsel for defendant in error were sound no question under that clause of the Fourteenth Amendment guaranteeing to persons the equal protection of the law, would ever arise in the United States Supreme Court on writ of error to a state tribunal. Whenever a state court determines that a certain classification made under its laws is not an arbitrary classification, it in effect construes its own laws relating to the per-

sons classified. But this court in *Yick Wo* v. *Hopkins*, 118 U. S. 356, at page 365, says:

> "In the case of the petitioner, brought here by writ of error to the Supreme Court of California, our jurisdiction is limited to the question, whether the plaintiff in error has been denied a right in violation of the constitution, laws or treaties of the United States. The question whether his imprisonment is illegal, under the constitution and laws of the state, is not open to us. And although that question might have been considered in the Circuit Court in the application made to it, and by this court on appeal from its order, yet judicial propriety is best consulted by accepting the judgment of the state court upon the points involved in that inquiry.
>
> *That, however, does not preclude this court from putting upon the ordinances of the supervisors of the county and city of San Francisco an independent construction; for the determination of the question whether the proceedings under these ordinances and in enforcement of them are in conflict with the constitution and laws of the United States, necessarily involves the meaning of the ordinances, which, for that purpose, we are required to ascertain and adjudge.*"

To the same effect are:

Balt. & Pot. R. R. v. *Hopkins*, 130 U. S. 210.

A., T. & S. F. R. v. *Matthews*, 174 U. S. 96.

Houston & Texas Central R. R. Co. v. *Texas*, 177 U. S. 77.

In *Atchison, Topeka & Santa Fe R. R. Co.* v. *Matthews*, *supra*, at the bottom of page 100 this court says:

> "This court is not concluded by the opinion of the Supreme Court of the state. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 366. *It forms its own*

> *independent judgment as to the scope and purpose of a statute,* while, of course, leaning to any interpretation which has been placed upon it by the highest court of the state. We have referred to the interpretation placed upon the respective statutes of Texas and Kansas by their highest courts, not as *conclusive,* but as an interpretation towards which we ought to lean, and which, in fact, commends itself to our judgment."

In *Enfield* v. *Jordan,* 119 U. S. 680, the court had under consideration a statute of Illinois authorizing "any village, city, county or township organized under the township organization law, or any other law of the state, along or near the route of the railway" there mentioned, "to subscribe to the stock of the railroad company, or make donations to it." The Supreme Court of the State of Illinois construed that act so as not to include towns; yet this court did not hesitate to give its own construction to the statute and decide that the act under the term "villages" included towns, although not expressed therein.

5.

It is next argued by counsel for defendant in error that the term "city" is generic and includes "village" or "incorporated town." They first argue that the act in question is a remedial statute and should be liberally construed, and urge that so construed, the word "village" or "incorporated town" can be read into the act.

Whether or not the act is penal or remedial, or both, or whether the act should be strictly construed or liberally construed, it must be clear to this court

that one must stretch his imagination quite severely to read "city" as "village."

If counsel for defendant in error must have authority for the position that no such construction can be placed upon the act, we say, first, that the act is penal as well as remedial and should be strictly construed. (See *Allegheny* v. *Gibson*, 90 Pac. 397; *Underhill* v. *Manchester*, 45 N. H. 214, 221.) In any event, the statute is certainly in derogation of the common law and it has been uniformly held that the common law is never changed by implication. (*Shaw* v. *R. R. Co.*, 101 U. S. 557; *Porter* v. *Dement*, 35 Ill. 478; *Thompson* v. *Weller*, 85 Ill. 197; *Hamilton* v. *Jones*, 125 Ind. 176; *Thornburg* v. *Am. Strawboard Co.*, 141 Ind. 443; *Sarazin* v. *N. R. Co.*, 153 Mo. 479.)

However, confining ourselves to the main issue, viz.: whether or not the word "city," as used in the Indemnifying Act, is a generic designation and includes "villages" or "incorporated towns," a cursory examination of the argument for defendant in error, and the authorities in support thereof, will disclose that counsel really prove, if anything, that the word "town" is generic, so as to include "city" and "village." For instance, counsel cite Tonlyn's Law Dictionary to the effect that

> "Under the name of a town or village, boroughs and cities are contained for every borough or city is a town."

which is altogether different from saying that every town is a city or borough. And so is Bouvier's Law Dictionary cited by counsel for defendant. It is there said,

> "A city is a town incorporated by that name,"

which is not exactly saying that every town is a city. And again, quoting from Lord COKE,

> "And it appeareth by Littleton, that town is a genus, and a borough is the species.",

which does not prove that a city or borough is a genus and that a town is a species of the city or borough. And so in the case of *State ex rel. Rice* v. *Simmons*, 35 Mo. Appeal 374, cited by counsel for defendant in error, it was held that the word "town" included "city." To the same effect was *State ex rel. Wood* v. *Goldstucker*, 40 Wis. 124, and *Pell* v. *Newark*, 40 N. J. L. 552, cited by counsel for defendant in error.

The cases of *Martin* v. *People*, 76 Ill. 524; *Phillips* v. *The Town of Scales Mound*, 195 Ill. 353; *People* v. *Village of Harvey*, 142 Ill. 173; *People* v. *Pike*, 197 Ill. 452; *Enfield* v. *Jordan*, 119 U. S. 680, merely hold that the word "village" and "incorporated town" are synonymous. This is by reason of the peculiarity of our Cities and Villages Act.

In none of the cases cited by counsel for defendant in error, excepting that of *Burke* v. *Monroe County*, 77 Ill. 610, and *Bruner* v. *Madison County*, 111 Ill. 11, in both of which cases the court had before it for consideration the same statute, has any language been used to the general effect that the word "city" included "village" or "incorporated town." In the cases last cited the words "*incorporated towns* and cities" were used in one part of the act and it was held that from the context of the entire act it was apparent that the intention of the legislature was to include "incorporated towns" in the repealing clause of the same act where the word "cities" only was used

On the other hand, in the case of *Pittsman* v. *Freeburg*, 92 Ill. 111, it was held that a statute which applies only to counties and cities, does not include villages.

In *Enfield* v. *Jordan, supra*, this court, construing an Illinois statute, said, on page 684:

> "The Town of Enfield is not a township, nor a county, nor a city. If it is within the purview of the act it must be because it is a village. The question then arises, is the incorporated town of Enfield a village within the meaning of the act?"

B.

The Act arbitrarily discriminates between the inhabitan's of the same county and is therefore unconstitutional.

1.

Again we respectfully call this court's attention to the first section of the act. It will be noted that the liability created is against the city if the property destroyed is within the limits of the city, otherwise the liability is imposed upon the entire county. We urge that the effect of this provision is to deny the inhabitants of cities the equal protection of law which gives to the inhabitants of the county, residing outside the limits of any city, a remedy against the county for the destruction of their property by mob violence. The inhabitants of the City of Chicago are within the jurisdiction of the County of Cook. They are subject to taxation for the purposes of maintaining the county government, and it is the

duty of the county to give police protection to the inhabitants of cities within its jurisdiction, as well as to all other inhabitants of the same county.

In *Barbier* v. *Connolly*, 113 U. S. 27, this court, through Mr. Justice FIELD, on page 31, said:

> "The Fourteenth Amendment, in declaring that no state 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition. * * *"

The fact that the inhabitants of cities are by the same act given a remedy against the city is no answer to this contention, because the remedy thus given is not the same remedy which is given to the other inhabitants of the county.

2.

Moreover, the effect of this provision of the statute is to impose a burden upon those persons living within the limits of a city which is double that im-

posed upon all other inhabitants of the same county. The former must bear the burden of indemnifying persons for property destroyed within the limits of their city and must also share the burden of indemnification for property destroyed in their county outside the limits of any city; but the latter must only share with the inhabitants of the city in indemnifying owners of property destroyed in the county outside the city limits.

If the act operated equally upon the inhabitants of one part of a county (those living within the limits of the city) and all the other inhabitants of the same county, it should provide that the city *or* the county, in which the property was destroyed, shall be liable, or it should provide for a method of paying the judgment rendered against the *county* under the act, by levying a tax upon all taxable property situated in the county *outside* the limits of any city.

For the reasons urged we respectfully submit that the judgment of the Supreme Court of Illinois should be reversed.

Respectfully submitted,

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